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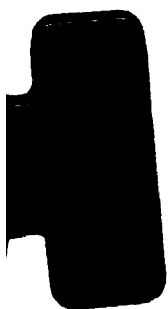
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PARK CHAMBERLAIN
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RAJ
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v. 2

REPORTS
OF
DECISIONS IN PROBATE

BY
JAMES V. COFFEY,
JUDGE OF THE SUPERIOR COURT,

IN AND FOR THE
CITY AND COUNTY OF SAN FRANCISCO, STATE OF
CALIFORNIA.

REPORTED AND ANNOTATED BY
PETER V. ROSS AND JEREMIAH V. COFFEY,
Of the San Francisco Bar.

VOLUME TWO.

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COFFEY'S

PROBATE DECISIONS.

ESTATE OF ALEXIS O. KUSTEL, DECEASED.

[No. 3498; decided August 11, 1884.]

Olograph.—An Instrument Testamentary in Character, if proved to be entirely written, dated and signed by the author, is established as an olographic will.

Death—Presumption from Unexplained Absence.—In addition to the legal presumption arising from unexplained absence for seven years, certain facts have been noticed by courts as grounds on which inferences of death may rest. But no general or certain rule can be established; each case must be decided upon the facts, and the probabilities that life has been destroyed.

Death—Presumption When Vessel Fails to Return.—The fact of death may be found from the lapse of a shorter period than seven years where one sails in an unseaworthy vessel on the night of a violent storm and the vessel is unheard of for a long time after the voyage should have been accomplished.

H. C. McPike, for petitioner.

COFFEY, J. Captain Alexis O. Kustel was a member of the firm of Kustel & Wightman, having their principal place of business in San Francisco, but engaged in commerce in the South Sea Islands. In 1883, June 24, Captain Kustel set sail from the Island of Apia for another island of the Samoan group, in a leaky and unseaworthy vessel; during the night of his departure a fearful storm arose, and neither the vessel nor any of her crew or passengers was heard of subsequently hitherto; and by mariners and others conversant with the circumstance the vessel has been given up as lost with all on board. Now comes into court Mrs. Elizabeth Kustel and presents for probate a paper alleged to be the olographic will of Captain Kustel, which is in these terms:

"San Francisco, February 19, 1880.

"I, Alexis Kustel, of the city of San Francisco, now being of sound mind, do hereby make this my last will and testament, revoking all former wills of whatsoever kind. In case of my death I leave all my property, of whatever kind, to my wife, Lizzie Kustel, after paying all just debts. Should my wife and myself get lost at sea or die, I wish the property kept in trust as long as my mother lives, to pay her \$50 per month from the profits of such property as I may possess, and when she dies I wish it to be evenly divided between my brothers, Oscar Kustel, Arpad Kustel and Casimir B. Kustel, or their children. I hereby appoint as my executors without bonds Lizzie Kustel, Oscar Kustel and John Wightman.

"ALEXIS KUSTEL."

The authenticity of this document is established; under the statute (sections 1309, 1940, Code of Civil Procedure) it is proved to be entirely written, dated and signed by Captain Kustel. The sole question is as to the proof of his death. Is the court warranted in finding the fact of death from the circumstances under which Captain Kustel departed from Apia on the 24th of June, 1883? (1) The vessel in which he set out to sea was unseaworthy; (2) the same night a great storm prevailed at sea; and (3) from that time no tidings of the vessel or of those on board have been heard.

In addition to the legal presumption arising from unexplained absence for a period of seven years, certain facts have been noticed by courts as affording grounds on which inferences of death may rest: 2 Wharton on Evidence, sec. 1277.

One who has sailed on a vessel which has not been heard of for such a length of time as would be sufficient to allow information to be received from any part of the world to which the vessel or those on board might have been expected to be carried, and who has not been heard of since the vessel sailed, may be presumed to be dead. No general or certain rule can be established in such cases; each case must be decided by the competent tribunal, upon proof of the facts and probabilities that life has been destroyed: *White v. Mann*, 26

Me. 370. When, shortly after a vessel sailed, a violent storm arose and prevailed along the coast, held, that after the lapse of three years without any tidings of the vessel or of any on board, the death of the captain during the storm might be presumed: *Gibbs v. Vincent*, 11 Rich. 323.

In the case last cited it is observed by the court that it is not from the presumption arising alone from the length of time that the death is inferred, but from the prevalence of a violent storm on the track of his vessel about the time he sailed, and that neither vessel nor any one on board has been heard of since; and (1 *Greenleaf's Evidence*, sec. 41) the fact of death may be found from the lapse of a shorter period than seven years, if the circumstances concur, as if the party sailed upon a voyage which long since should have been accomplished and nothing has been heard of the vessel. This doctrine is sustained by many decisions, among others: *Spears v. Burton*, 31 Miss. 547; *Stouvenel v. Stephens*, 2 Daly (N. Y.), 319; *Smith v. Knowlton*, 11 N. H. 197.

These are cases from other states, but the principle has not been rejected in California, so far as it has been invoked. The proof of the unseaworthiness of the vessel in which Captain Kustel left Apia (she was not insured), the prevalence of a violent storm on the same night on the sea whereon the vessel was sailing, differentiate this case from *Ashbury v. Saunders*, 8 Cal. 62, 68 Am. Dec. 300, the specific perils which, in the opinion of Mr. Justice Burnett (adopting the views of Mr. Chief Justice Gibson in *Burr v. Sims*, 4 Whart. 150), were necessary to be established in that case, have been proved in this matter. It follows from the application of this principle that the death of Alexis O. Kustel must be found as a fact, and letters testamentary should issue according to the terms of the will.

PRESUMPTION OF DEATH.

Seven Years' Absence—Presumption Arising from.—It is a general rule of almost universal application that for all legal purposes a presumption of his death arises from the continued and unexplained absence of a person from his home or place of residence without any intelligence from or concerning him for the period of seven years. In other words, the law presumes, after seven years' continued ab-

sence, that a person is dead concerning whom nothing has been heard or known during that time by those who, were he living, would naturally hear from him. If a person leaves his home, or disappears, the presumption in favor of life, in the absence of special circumstances, continues until a period of seven years has elapsed without any tidings or intelligence from him, but, after that, the rule is reversed, and the law presumes his death: *Crawford v. Elliott*, 1 Houst. 465; *Prettyman v. Conaway*, 9 Houst. 221, 32 Atl. 15; *Doe ex dem. Cofer v. Flanagan*, 1 Ga. 538; *Adams v. Jones*, 39 Ga. 479; *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797; *Wentworth v. Wentworth*, 71 Me. 72; *Tilly v. Tilly*, 2 Bland. Ch. 436; *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443; *Loring v. Steineman*, 1 Met. (Mass.) 204; *In re Stockbridge*, 145 Mass. 519, 14 N. E. 928; *Waite v. Coaracy*, 45 Minn. 159, 47 N. W. 537; *Lajoye v. Primm*, 3 Mo. (529) 368; *Hancock v. American Life Ins. Co.*, 62 Mo. 26; *Wheelock v. Overshiner*, 110 Mo. 100, 19 S. W. 640; *Flood v. Grownney*, 126 Mo. 262, 28 S. W. 860; *Smith v. Knowlton*, 11 N. H. 191; *Forsaith v. Clark*, 21 N. H. 409; *Wambaugh v. Schenck*, 2 N. J. L. 229; *Burkhardt v. Burkhardt*, 63 N. J. Eq. 479, 52 Atl. 296; *Jackson v. Claw*, 18 Johns. 347; *McCartee v. Camel*, 1 Barb. Ch. 455; *Eagle v. Emmet*, 4 Brad. Sur. 117; *Morrow v. McMahon*, 35 Misc. Rep. 348, 71 N. Y. Supp. 961; *Buoff v. Greenpoint Sav. Bank*, 40 Misc. Rep. 549, 82 N. Y. Supp. 881; *University of North Carolina v. Harrison*, 90 N. C. 385; *Lewis v. Mobley*, 4 Dev. & B. 323, 34 Am. Dec. 379; *Rice v. Lumley*, 10 Ohio St. 596; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Whiteside's Appeal*, 23 Pa. 114; *Appeal of Esterly*, 109 Pa. 222; *Burns v. Ford*, 1 Bail. 507; *Craig v. Craig*, Bail. Eq. 102; *Boyce v. Owens*, 1 Hill, 8; *Corley v. Holloway*, 22 S. C. 381; *Griffin v. Southern Ry. Co.*, 66 S. C. 77, 44 S. E. 562; *Primm v. Stewart*, 7 Tex. 178; *French v. McGinnis*, 69 Tex. 19, 9 S. W. 323; *Scott v. McNeal*, 5 Wash. 309, 34 Am. St. Rep. 863, 31 Pac. 873; *Boggs v. Harper*, 45 W. Va. 554, 31 S. E. 943; *Cowan v. Lindsay*, 30 Wis. 586; *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086.

After seven years have elapsed without intelligence of, or hearing from, one who has absented himself from his family or his home, the presumption of life ceases, and if no other evidence is introduced on that point, the court should proceed on the presumption of his death, without submitting the question to the jury: *Cowan v. Lindsay*, 30 Wis. 586. As examples of the giving effect to such presumption, it may be stated that where a husband has been absent and unheard of for more than seven years, marriage by his wife to another after that time is presumed to be valid: *Burkhardt v. Burkhardt*, 63 N. J. Eq. 479, 52 Atl. 296; *Boyce v. Owens*, 1 Hill, 5. But no lapse of time, when the husband is absent, but known to be alive, by being seen or heard of, in less than seven years, will of itself have the effect of allowing the wife to validly contract another marriage, or to contract as a feme sole: *Boyce v. Owens*, 1 Hill, 5. After an unaccounted for absence of seven years, the law presumes the absentee

to be dead, and in a case where he, if living, would inherit real estate, such estate will descend, not to him, but to the heirs of the person dying seised: *Appeal of Esterly*, 109 Pa. 222; *Burns v. Ford*, 1 Bail. 507.

It seems that, in order to establish the presumption of death from seven years' absence of a person unheard of, he must absent himself from his home originally, and proof of a change of his residence from one state to another, and that he has not been heard of in the former state for a period of seven years, does not create the presumption: *Keller v. Stuck*, 4 Redf. Sur. 294; *Latham v. Tombs*, 32 Tex. Civ. App. 270, 73 S. W. 1060. The rule as to the presumption of death of a person after seven years' absence is that such presumption of law does not attach unless it appear that such person has been absent from his domicile, or his last place of residence, without intelligence concerning him for the period of seven years: *Burnett v. Costello*, 15 S. D. 89, 87 N. W. 575; *Puckett v. State*, 1 Sneed (Tenn.), 355.

The mere absence of a person from a place where his relatives reside, not his own residence, and their failure to hear from him for seven years, are not sufficient to raise a presumption of his death, but in order to raise such presumption, there must be evidence of diligent inquiry at his last place of residence and among his relatives, and any other persons who would probably have heard from him if he were living: *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Litchfield v. Keagy*, 78 Ill. App. 398. Thus, if in an action to recover land, plaintiffs' claim as heirs at law of their deceased uncle, who is alleged to be dead by reason of his having been absent and unheard of for a period of seven years, but there is no showing that he was last heard of at the place where he last lived, or that he had any other home, or that he was unmarried and without children, the proof is insufficient to establish that he died intestate and without issue, or that plaintiffs are his heirs: *Ironton Fire Brick Co. v. Tucker*, 26 Ky. Law Rep. 532, 82 S. W. 241.

Failure to hear from an absent person for seven years, who is known to have had a fixed place of residence abroad, is not sufficient to raise a presumption of his death, unless due inquiry has been made at such place without getting tidings from him: *Wentworth v. Wentworth*, 71 Me. 72; *McCartee v. Camel*, 1 Barb. Ch. 458.

The presumption of death is raised by the absence of a person from his last place of domicile unheard of for seven years, and if a person removes from his domicile in one state to establish a domicile in another state or country, this is merely a change of residence, and absence from this last domicile for seven years unheard of is the absence upon which the presumption of death must be built, and if alive when last heard from at his new domicile the presumption is that life still continues: *Francis v. Francis*, 180 Pa. 644, 57 Am. St. Rep. 668, 37 Atl. 120; *Turner v. Sealock*, 21 Tex. Civ. App. 594,

54 S. W. 358. The mere absence of a person for seven years, even from his home, is not alone sufficient to raise the presumption of death, and there must be evidence also showing that he has not been heard from within that time: *Brown v. Jewett*, 18 N. H. 230.

If it is shown that a person was living some two or three years before the question of a presumption of his death from seven years' absence is raised, there is no presumption that he has since died: *Lowe v. Foulke*, 103 Ill. 58; *Lewis v. People*, 87 Ill. App. 588; *Duke of Cumberland v. Graves*, 9 Barb. 596; *Stroebe v. Fehl*, 22 Wis. (337) 324. In other words, if one is shown to be alive at a certain time, there is a presumption of the continuance of his life after that period which must be overcome by some sort of proof: *Hancock v. American Life Ins. Co.*, 62 Mo. 26.

Rebuttal and Burden of Proof.—The legal presumption of death which arises from the absence of one from his home for the period of seven years, and who in the meantime is not heard of, is equivalent to prima facie evidence of the fact, and may be rebutted by counter evidence: *Youngs v. Heffner*, 36 Ohio St. 232. If a person has not been heard from for more than seven years, he is presumed to be dead, and it devolves upon the person asserting the contrary to make it appear: *Forsaith v. Clark*, 21 N. H. 409; *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9. The burden of proof is upon the person denying the death, and the presumption of death is not overcome by mere similarity of name, but the identity of the person must be shown: *Hoyt v. Newbold*, 45 N. J. L. 219, 46 Am. Rep. 757. A shorter absence than seven years will not suffice to raise a presumption of death, and the person in whose interest it is to show that he was alive within that time is at liberty to do so by such facts and circumstances as will inspire that belief in the minds of the jury. The person who claims a benefit or interest in his being alive within the seven years must prove it: *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Smith v. Smith*, 5 N. J. Eq. 484. When the presumption of death has been raised, the jury must determine, under proper instructions, what quantity of evidence will outweigh such presumption: *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 136.

To rebut the presumption of death arising from an absence of seven years unheard from, evidence is admissible to show that the absent person has been heard of as living within that time, though by others than members of his family: *Flynn v. Coffee*, 12 Allen, 133. To rebut such presumption, testimony of a witness who saw a person bearing the supposed deceased's name, as to his appearance and conversations had with him in regard to his family connections, is admissible: *Nehring v. McMurrain* (Tex. Civ. App.), 45 S. W. 1032. The testimony of several uncontradicted, unimpeached and disinterested witnesses that the absent person returned and was seen alive within considerably less than seven years from the time of his original dis-

appearance is sufficient to rebut the presumption of his death: *Thomas v. Thomas*, 19 Neb. 88, 27 N. W. 84. When the presumption is sought to be established by the affidavits of witnesses who have no interest in the absent person, being neither relatives, friends, nor members of the family, their testimony is overcome by the testimony of one credible witness who is well acquainted with the absent person, knows his handwriting, and has received a letter from him within the seven years: *Smith v. Smith*, 49 Ala. 156.

In Case of Fugitive from Justice.—The fact that the absent person is a fugitive from justice does not prevent the presumption from arising, but is admissible to rebut the presumption of death: *Mutual Benefit Life Ins. Co. v. Martin*, 108 Ky. 11, 55 S. W. 694; *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 69 S. W. 662. The presumption is rebutted when it is shown that the absent fugitive has been seen, that there are rumors as to his whereabouts, and that he absented himself when a warrant was issued for his arrest, and that a woman of bad repute left about the same time: *O'Kelly v. Felker*, 71 Ga. 775.

Time of Death of Absent Person.—If a person leaves his home, place of residence or abode for temporary purposes, and is not seen, heard of or known to be living for the continuous term of seven years thereafter, he is presumed to be dead, but in such case the presumption of life continues and the presumption of death does not arise until the expiration of seven years from the time of the disappearance, unless there is evidence that such person was at some particular date in contact with some specific peril, or there are other circumstances sufficient to quicken the period of time necessary to raise the presumption of death. Ordinarily the time of death is presumed to be at the expiration of the seven years: *Crawford v. Elliott*, 1 Houst. 465; *State v. Henke*, 58 Iowa, 457, 12 N. W. 477; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Newman v. Jenkins*, 10 Pick. 515; *Schank v. Griffin*, 84 Md. 557, 36 Atl. 443; *Bailey v. Bailey*, 36 Mich. 181; *Smith v. Knowlton*, 11 N. H. 191; *Executors of Clark v. Canfield*, 15 N. J. Eq. 119; *Burkhardt v. Burkhardt*, 63 N. J. Eq. 479, 52 Atl. 296; *Matter of Davenport*, 37 Misc. Rep. 455, 75 N. Y. Supp. 934; *Eagle v. Emmet*, 4 Brad. Sur. 117; *Burr v. Sim*, 4 Whart. 150, 33 Am. Dec. 50; *Schoneman's Appeal*, 174 Pa. 1, 34 Atl. 283. The presumption of death from seven years' unexplained absence does not by law arise until the full period elapses, and the presumption of life will continue to the end of the seven years, unless facts are proved showing that the absent person probably died sooner: *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028. At the end of seven years from the time that an absent person was last heard of, the presumption of life ceases and the presumption of death takes its place. The legal presumption establishes not only the fact of death, but also the time of death: *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248. In the absence of any fact except that of the absence of a person for seven

years without having been heard from, the presumption is that such person died on the last day of the seven years: *Kauz v. Improved Order of Red Men*, 13 Mo. App. 341. If no sufficient facts are shown from which to draw a reasonable inference that death occurred within the lapse of seven years, the person will be accounted in all legal proceedings as having lived during that period, and rights depending upon his life or death will be administered as if he died on the last day of that period: *Eagle's Case*, 3 Abb. Pr. 218.

Although it is presumed that a person absent from his home for seven years continuously without having been heard from, died at the end of that period, it will not be presumed that he died at any other time than at the end of the seven years. And if it is claimed that he met his death within a shorter time, that must be proved as a fact: *Hamilton v. Ross*, 3 N. J. Eq. 465; *McCartee v. Camel*, 1 Barb. Ch. 456; *Evans v. Stewart*, 81 Va. 724.

The rule as to the presumption of death is that it arises from the absence of the person from his domicile without having been heard of for seven years, and the current of authority establishes the rule that the presumption is only that the person is then dead, namely, at the end of the seven years, and does not extend to the death having occurred at the end of any other particular time within that period, but leaves it as a matter of fact whether it was at an earlier or later day: *State v. Moore*, 11 Ired. 160, 53 Am. Dec. 401; *Spencer v. Roper*, 13 Ired. 333; *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086. Although a person who has not been heard of after leaving his home for seven years is presumed to be dead, yet the question as to when such presumed death occurred is to be determined from all the facts and circumstances in the case, there being no presumption either of life or death at any particular time during the seven years: *Whiteley v. Equitable Life Ins. Co.*, 72 Wis. 170, 39 N. W. 369. If one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore. To raise the latter presumption, special facts and circumstances should be shown, reasonably conducing to that end. The evidence need not be direct or positive, but it must be of such a character as to make it more probable that he died at a particular time than that he survived: *Hancock v. American Life Ins. Co.*, 62 Mo. 26. Proof that a person while living happily with his family, and standing well in the community, left home stating that he was going in a boat on a hunting trip, that he had not been heard of two years later, that an empty boat with certain articles of personal property had been found a few days after his disappearance at the place to which he stated he was going, is not sufficient to raise a presumption of his death at the time of his disappearance, in the absence of evidence that the articles found belonged to him, or that he hired a boat and went in the direction of the place where the boat was found: *Martin v. Union Mutual Ins. Co.*, 13 Wash. 275, 43 Pac. 53.

The presumption of death arising from an unexplained absence for seven years does not necessarily imply that the absent person died at the end of that period. Circumstances may be introduced to show the probability of his death at an earlier date and raise a presumption of death prior to the end of the seven years' absence: *Garden v. Garden*, 2 Houst. 574; *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 69 S. W. 662; *Stouvenel v. Stephens*, 2 Daly, 319. But in the latter case strict and strong proof is required to create the presumption: *Garden v. Garden*, 2 Houst. 574. The jury are entitled to find, as a matter of fact, that a person died within a much less period than seven years since he was last heard of, on circumstantial evidence which leads their minds to such a conclusion: *Smith v. Knowlton*, 11 N. H. 191; *Puckett v. State*, 1 Sneed (Tenn.), 356. The presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living, and when it is sought to prove death within that period by circumstantial evidence, there must be a showing of diligent inquiry at the last place of residence and among relatives, and any others who would probably have heard from the absent person if living, and also at any known place of fixed foreign residence: *Bailey v. Bailey*, 36 Mich. 181.

A person who, for seven years, has not been heard from by those who, had he been alive, would naturally have heard from him, is presumed to be dead, but the law does not necessarily raise any presumption as to the precise time of such death, and the jury may infer that he died before the expiration of the seven years, if it appears that within that period he encountered some special peril, or came within the range of some impending or imminent danger, which might reasonably be expected to destroy life: *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086. Thus, from nonclaim of rights or exposure to peculiar sickness, death at an earlier period than seven years may be inferred: *Robinson v. Robinson*, 51 Ill. App. 316. If a person leaves his usual place of residence with an intention of returning to it, and continues to be absent from it for seven years without being heard of, he is presumed to be dead, but the time when such presumption will arise may be greatly abridged by proof that the person has encountered such perils as might be reasonably expected to destroy life, and has been so situated that according to the ordinary course of human events he must have been heard from if he had survived. No general rule can in such cases be established, but each case must be decided by a competent tribunal upon proof of the facts and probabilities that life has been destroyed: *White v. Mann*, 26 Me. 361.

The presumption arising from the absence of a person for seven years without having been heard from, that he died at the end of that period may be rebutted by proof of facts tending to show that his death occurred at an earlier period: *Kauz v. Improved Order of*

Red Men, 13 Mo. App. 341; *Hancock v. American Life Ins. Co.*, 62 Mo. 26; *Matter of Ackerman*, 2 Bedf. Sur. 521. The time of the death of a person who cannot be found is presumed to be seven years from the date upon which he was last heard from, but the person to whose interest it is to show that he died before that time may rebut this presumption by showing from facts and circumstances that his death in all probability happened before that day, or at any particular day between that time and the day he was last heard from: *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 249. The burden of proving that the death took place at any particular time within the seven years lies upon the person claiming a right to the establishment of which that fact is essential: *Schank v. Griffin*, 84 Md. 557, 36 Atl. 443; *Corley v. Holloway*, 22 S. C. 380; *Evans v. Stewart*, 81 Va. 724.

Less than Seven Years' Absence—General Rule Respecting.—There is no arbitrary rule as to the length of time of the continued absence of a person unheard from or of which will raise a presumption of his death: *Czech v. Bean*, 35 Misc. Rep. 729, 72 N. Y. Supp. 402. The legal presumption of death permitted by the common law after the absence and lapse of seven years unaccounted for is also allowable before the expiration of that period, if there is evidence tending to prove that death occurred at an earlier date, or showing a greater probability of death than life at the prior date: *Carpenter v. Supreme Council Legion of Honor*, 79 Mo. App. 597; *Waite v. Coaracy*, 45 Minn. 159, 47 N. W. 537; *Eagle v. Emmet*, 4 Brad. Sur. 117; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907. Death, like any other fact, may be established by circumstantial evidence, when direct proof is not obtainable, and when the absence of a person without tidings from him concurs with other attendant and supporting circumstances to produce the conviction that he is dead, such proof is all that can be required: *Boyd v. New England etc. Life Ins. Co.*, 34 La. Ann. 448. There is no arbitrary or positive rule in respect to the time when the presumption of death may be drawn from the continued absence of a person. It is not necessary that seven years or any specific period should elapse, to lay the foundation for such presumption, but it may be drawn on a shorter period, whenever the facts of the case warrant it: *Merritt v. Thompson*, 2 Hilt. 550.

The death of an absent person may be presumed in less than seven years, from other facts and circumstances than exposure to a probably fatal danger, such as the improbability of, and lack of, motive for abandoning his home: *Cox v. Ellsworth*, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460; *Northwestern Mut. Life Ins. Co. v. Stevens*, 71 Fed. 258. Thus, the death of an absent person may be presumed in less than seven years from the date that he was last heard from, not only from evidence that he was exposed to peril which probably resulted in his death, but from other facts and circumstances tending to show such result, and in this connection evidence of character,

habits, affections, attachments, prosperity, domestic relations, objects in life, and the like, making the abandonment of home and family improbable, and showing a want of all those motives supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred, without regard to the duration of such absence: *Tisdale v. Connecticut etc. Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 136. If one who is studious in habits, attentive to business, with a fixed and permanent residence and pleasant domestic relations, suddenly disappears, these facts may warrant a jury in finding his death at the time of his disappearance: *Hancock v. American Life Ins. Co.*, 62 Mo. 26.

Less than Seven Years' Absence—Exposure to Peril.—If, when last heard from, a person was in contact with some specific peril, this circumstance may raise a presumption of death without regard to the duration of the absence. But other circumstances may create the same presumption, as where the circumstances of the disappearance are more consistent with the theory of death than that of a continuance of life, when considered with reference to those influences and motives which ordinarily govern men, in either of which cases the jury may infer death at any time within the seven years, such as may seem to it most probable: *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 121; *Sheldon v. Ferris*, 45 Barb. 124. Absence of a person alone does not raise a presumption of his death unless continued unheard from for seven years, but absence in connection with surrounding circumstances, such as the failure of his family to hear from him, his character, and business and family relations, together with the fact that he was last known to be seen near the place where a murder was supposed to have been committed, and the reputation in his family and with his friends that he is dead, creates a strong presumption of his death at the time of his disappearance, the law being satisfied with less than certainty, yet demanding a preponderance of the evidence. On the other hand, evidence to overcome the presumption of death, that the person supposed to be dead was in a financial condition which might have induced him to abscond, or that he was a speculator, or visionary in his business, is all proper evidence to be considered by the jury in determining the fact of death or life: *Sensendefer v. Pacific Mutual Life Ins. Co.*, 19 Fed. 68. The perils to which one may be exposed and which will raise a presumption of death from his absence unheard from for less than seven years most frequently arise, perhaps, from the perils of the sea. Thus, if, shortly after a vessel sails, a violent storm arose, the death of the captain of such vessel may be presumed to have occurred during such storm, after the lapse of three years without any tidings from such vessel, or any of the persons then aboard: *Gibbes v. Vincent*, 11 Rich. 323. And one on board a vessel under such circumstances is presumed to have lost his life at the time of the storm in which the vessel is presumed to have gone down or been destroyed: *Larned v. Corley*, 43

Miss. 688. If a commander of a vessel and his crew and passengers begin a voyage at sea and neither the vessel nor those who went in her are afterward heard of, the presumption arises, after the utmost limit of time for her to have completed the voyage and to have heard from all the commercial ports of the world if she had arrived, that the vessel has been lost and that all on board of her have perished. The presumption of death in such case does not rest upon the fact alone that the person in question has been absent and unheard from for a specific length of time, but also upon the fact that the vessel has not been heard from, and the question in such case is not whether it is not possible that the person may be alive, but whether the circumstances do not present so strong a probability of his death that a court should act thereon. Presumptions founded on a reasonable probability must prevail as against mere possibilities, otherwise the conclusion could never be arrived at, that a man was dead until the natural limit of human life had been reached: *Meritt v. Thompson*, 1 Hilt. 550; and to the same effect, *Gerry v. Post*, 13 How. Pr. 118; *King v. Paddock*, 18 Johns. 141; *Oppenheim v. Wolf*, 3 Sand. Ch. 571. If a person takes passage on a vessel and is shown when last seen on the voyage to be sick and despondent and leaning out through a "shutter" which opens on the water, and when the voyage is ended ineffectual search is made for him, while his belongings are found in his room, and he was not seen to go ashore at way ports and could not have landed unobserved, the facts are amply sufficient to show that he was brought in contact with a specific peril and to raise the presumption that he met his death by drowning at the time when last seen: *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 122.

Long-continued Absence.—If a person has been absent from his home for a long time, the period of his absence exceeding seven years without his having been heard from or of, and nothing appears to account for such absence, the jury may, and ought to, presume his death, as a legal presumption of his death then arises: *Bailey v. Bailey*, 36 Mich. 181; *Matter of Barr*, 38 Misc. Rep. 355, 77 N. Y. Supp. 935; *Matter of Sanford*, 199 App. Div. 479; *Miller v. Beates*, 3 Serg. & R. 490, 8 Am. Dec. 658.

The absence of a person for eight years without being seen or heard of warrants a presumption of his death, and if to this is added the proof of his frequent declarations of an intent to commit suicide, the presumption is strengthened, and warrants the conclusion that his death occurred about the time of his disappearance: *Sheldon v. Ferris*, 45 Barb. 124. If one is absent twenty years from the place where he and all of his relatives resided, and he has never been heard from, though inquiry has been made for him, he is presumed to be dead so that letters of administration on his estate are authorized: *Ferrill v. Grigsby* (Tenn.), 51 S. W. 114. If a husband has been absent from his home and unheard of by his wife for seventeen years, he is presumed to be dead: *Garwood v. Hastings*, 38 Cal. 216; *Osborn*

v. Allen, 26 N. J. L. 388. And if he has been absent under like circumstances for ten years, his wife may contract a valid marriage with another, as he is presumed to be dead: *Estate of Harrington*, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000. The continued absence, unheard from, and nonappearance of depositors at a bank for twenty years, and the nonclaimer by them of their deposits, are circumstances sufficient to raise a presumption of their death: *Bank of Louisville v. Board of Trustees*, 83 Ky. 219. If an unmarried man has been absent and not heard from for more than twenty-five years, it may be presumed that he died seven years from his disappearance and without issue: *Chapman v. Kimball*, 83 Me. 389, 22 Atl. 254; *Shown v. McMaekin*, 9 Lea, 601, 42 Am. Rep. 680. Such an unexplained absence of forty-three years rebuts the presumption of a continuance of life and creates a presumption that the man is dead and that he left no issue him surviving: *McNulty v. Mitchell*, 41 Misc. Rep. 293, 84 N. Y. Supp. 89. In *Doe ex dem. Hurdle v. Stockley*, 6 Houst. 447, it was, however, held that if a married man and his family left the state and were not again heard of for fifty years by any of their relatives living at the place from which they absented themselves, the jury cannot be instructed to presume that they are all dead without issue. It has also been held that under such circumstances it is proper to refuse to distribute the share of an estate bequeathed to an unmarried man who has been absent over fifty years without being heard from, on the presumption that he died without issue, in the absence of satisfactory proof of diligent inquiry at the proper place to ascertain whether he is dead or alive: *Dunn v. Travis*, 56 App. Div. 317, 67 N. Y. Supp. 743; affirmed *Hornberger v. Miller*, 163 N. Y. 578, 57 N. E. 1112. The better rule is in accord with this holding, namely, that some inquiry must be made at the absentee's last known place of residence, in order to establish the presumption of his death, no matter how long his absence may have continued: *Dworsky v. Arndtstein*, 29 App. Div. 274, 51 N. Y. Supp. 597. But it has also been held that the lapse of twenty-four years, though without proof of inquiry or other circumstances, is sufficient to warrant the presumption of the death of a person of whom nothing has been heard for that length of time: *Innis v. Campbell*, 1 Rawle, 372. The presumption of death from long-continued absence is not an imperative rule of law where the circumstances of the disappearance permit of a different inference: *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 69 S. W. 662. One's absence from a particular place raises no presumption of his death, no matter how long such absence is continued if there is no evidence that he ever established his residence there, but his absence from his established home or residence must be proved, and that no intelligence has been received of him for seven years or more: *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524.

In Case of Sailors and Soldiers.—If a sailor departs on a voyage and is not heard from thereafter his death is presumed at the end of seven years: *Godfrey v. Schmidt*, Cheves Eq. 57. A seafaring man who goes to sea and is not heard from within nine years is presumed to be dead: *Burleigh v. Mullen*, 95 Me. 423, 50 Atl. 47. Or if a sailor goes to sea and is not heard from for fifteen years, the presumption arises that he is dead: *Larned v. Corley*, 43 Miss. 688. The same presumption arises if a sailor is absent unheard from for twenty-three years: *Sterrett v. Samuel*, 108 La. Ann. 346, 32 South. 428; *Holmes v. Johnson*, 42 Pa. 159. But it is not necessary that seven years or any specific period should elapse to lay the foundation for the presumption of the death of a sailor from his absence, and the presumption may be drawn whenever the facts of the case will warrant it. Thus, if the person "whose death is in question went to sea, and nothing has been heard from the vessel in which he left or of those who went in her, the presumption, after a sufficient length of time has ensued, will be that the vessel was lost, and that all on board perished. The length of time that must elapse to create such presumption depends upon the nature of the voyage and of the navigation, and a court or a jury will be guided by the circumstances that are laid before them, in determining whether such presumption is warrantable or not": *Merritt v. Thompson*, 1 Hilt. 550. In such cases the presumption of death may arise in a much shorter time than seven years. Thus, if it takes a vessel four months ordinarily to make the voyage, and she is not heard from in seventeen months after her departure, it may be presumed that she is lost and that all on board of her have perished: *Merritt v. Thompson*, 1 Hilt. 550.

A soldier who, after joining the army goes to war, and never returns nor is heard of afterward, may be presumed dead after twenty-five years: *Jamison v. Smith*, 35 La. Ann. 609.

In Case of Extreme Old Age.—The death of a person may be presumed after a long lapse of time, as where, if alive, he would have been one hundred and fifty years old. Persons, however, have been known to live ninety and one hundred years, and the court cannot say that others have died at an earlier age without some evidence on the subject: *Hammond v. Inloes*, 4 Md. 141.

The civil law presumes a person to be living at the age of one hundred years, and the common law does not stop much short of this: *Roe ex dem. Watson v. Tindal*, 24 Ga. 494. Thus under the civil law the death of an absentee who is less than one hundred years old is never presumed, but must be clearly shown as a fact: *Hayes v. Berwick*, 2 Mart. 138, 5 Am. Dec. 727; *Miller v. McElwee*, 12 La. Ann. 476; *Martinez v. Succession of Vives*, 32 La. Ann. 305; *Willet v. Andrews*, 51 La. Ann. 486, 25 South. 391. The death of a person before the bringing of the suit may be presumed when it would be contrary to the ordinary course of nature, through lapse of time, that

he should be living at that time, although it is not necessary to indulge any presumption of the period when death occurred, or up to which time life endured: *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698. Thus, a grantor in a deed will be presumed to be dead eighty years after its acknowledgment by him: *Young v. Shulenberg*, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135. The maker of a power of attorney, though aged, is presumed to have been alive five years later, at the time of the execution of a deed in his name by his attorney in fact appointed under such: *Chicago etc. R. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088.

Presumption at Time Judgment Rendered.—In the case of a judgment rendered by a court of a justice of the peace more than twenty-five years in the past, in the absence of proof that the defendant was dead at the time that the suit was brought and prosecuted to judgment, the presumption is that the defendant was living at that time, and not that he was dead: *Willis v. Ruddock Cypress Co.*, 108 La. 255, 32 South. 386.

Survivorship—Generally.—At common law there is no presumption of survivorship in case of persons who perish by a common disaster, and in the absence of evidence from which survivorship can be determined, it will be presumed for the purpose of settling rights to property, that all persons of whatever age or sex, perishing in a common disaster, died at the same time, as the common law does not, under any circumstances, even in the case where two or more perish by the same calamity, indulge in any presumptions of survivorship resting upon considerations of age or sex: *Balder v. Middeke*, 92 Ill. App. 227; *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 64 N. E. 1002, 59 L. B. A. 653; *Russell v. Hallet*, 23 Kan. 276; *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *Stinde v. Goodrich*, 3 Redf. Surr. 87; *Willbor's Petition*, 20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634, 51 L. B. A. 863; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385. Where two persons perish by the same disaster, there is no presumption of law as to survivorship, in the absence of a rule prescribed by positive statutory enactment: *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951. In a question of survivorship arising out of a common calamity, legal presumption founded upon the circumstances of age, size or physical strength do not generally obtain in the United States. That is a doctrine of the civil law which has not been adopted, and has been given no sanction in our system of jurisprudence: *Smith v. Croom*, 7 Fla. 81; *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518. The presumptions of law as to survivorship as between persons perishing in the same disaster which have become the rule of the civil law, have been adopted by the Civil Code of Louisiana and by the Code of Civil Procedure of California, section 1963, subdivision 40; but such presumptions apply only in the absence of circumstances of the fact, and when persons are respectively entitled

to inherit from one another: *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951. And, generally speaking, where several lives are lost in the same disaster, there is no presumption from age or sex that either survived the other, and the fact of survivorship must be proved by the person asserting it: *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132; *Supreme Council of Royal Arcanum v. Kacer*, 96 Mo. App. 93, 69 S. W. 671, 169 Mo. 301, 92 Am. St. Rep. 301, 69 S. W. 370, 59 L. R. A. 653. He who claims a right by virtue of survivorship must prove the fact of the survival of him through whom he claims, and failing in this, the property or fund remains vested as it was before the calamity: *Middeke v. Balder*, 198 Ill. 590, 98 Am. St. Rep. 284, 64 N. E. 1002, 59 L. R. A. 653; *United States Casualty Co. v. Kacer*, 169 Mo. 301, 92 Am. St. Rep. 641, 69 S. W. 370, 58 L. R. A. 436. Disparity of age may be considered in determining the question of survivorship as between an adult and an infant, or a person well stricken in years: *Cuye v. Leach*, 8 Met. 371, 41 Am. Dec. 518. And if several persons grown and infant perish in a fire, the probable origin thereof and the location of the bodies when found may be considered as an aid in determining the question of survivorship: *Will of Ehle*, 73 Wis. 445, 41 N. W. 627. And the fact of such survivorship does not require any higher degree of proof than any other fact in a civil case: *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951.

Survivorship in Case of Husband and Wife.—It is a general rule that if husband and wife are shown to have perished in the same casualty, nothing appearing to the contrary, there is no presumption of survivorship, but it is presumed that both died at the same moment: *Kansas Pacific Ry. Co. v. Miller*, 2 Colo. 445; *Balder v. Middeke*, 92 Ill. App. 227; *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 64 N. E. 1002, 59 L. R. A. 653; *Fuller v. Linzee*, 135 Mass. 468. If husband and wife die together on the same night from an escape of gas in their room there is, in the absence of evidence upon the point, no presumption that one survived the other: *Southwell v. Gray*, 35 Misc. Rep. 740, 72 N. Y. Supp. 342. And in such case where a benefit certificate of insurance provides that it shall be paid to the heirs of the deceased member, in case the named beneficiary dies before the insured, and the wife of the member is named as beneficiary, the benefits must go to the heirs of the deceased member, and not to the heirs of his wife: *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 64 N. E. 1002, 59 L. R. A. 653; *Southwell v. Gray*, 35 Misc. Rep. 740, 72 N. Y. Supp. 342. A different conclusion was reached in *Cournan v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550, where it was held that there was no presumption of survivorship, but that in the absence of competent and sufficient evidence to show that the wife, the nominated beneficiary, died before her husband, her legal representatives were entitled to the fund.

If both husband and wife perish in the same calamity, no presumption of survivorship of the wife arises from the fact that an order of the probate court granting letters of administration upon her estate recites that she was the surviving wife of her husband, and in a proceeding by her administrator to set aside the probate of her husband's will, it is error to refuse evidence aliunde upon the question of survivorship: *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741; but under subdivision 40 of section 1963 of the Civil Code of California, a presumption of survivorship arises where two persons perish in the same calamity from the probabilities resulting from strength, age and sex of the victims, and it results that if husband and wife perish in the same calamity, and there is nothing to show which expired first, and both are between the ages of fifteen and sixty, he is presumed to have been the survivor: *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855. See the application of this rule, where the calamity was an earthquake, in *Grand Lodge v. Miller* (Cal. App.), 96 Pac. 22. If a husband and wife perish together at sea, it is presumed that he survived her: *Moehring v. Mitchell*, 1 Barb. Ch. 264.

Survivorship in Case of Parent and Child, or Other Relatives.—If a mother and her infant son perish in a common catastrophe, and there is no positive evidence as to which perished first, there is no presumption of survivorship, but it will be presumed that both perished at the same time: *Stinde v. Goodrich*, 3 Redf. Surr. 87. The same presumption prevails as to mother and child, regardless of age or the sex of the child: *Moehring v. Mitchell*, 1 Barb. Ch. 264; *Russell v. Hallett*, 23 Kan. 276; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385. In case of a mother, aged sixty-nine years, her son in law, aged forty-five, and his two children, aged respectively ten and seven years of age, who all perished in the same shipwreck, there is no presumption of survivorship: *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; and if three sisters perish in the same calamity, no fact or circumstance appearing from which it may be inferred that either survived the other, the rights of succession to their estate are to be determined as if death occurred to all at the same moment: *Petition of Willbor*, 20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634, 51 L. R. A. 863. No presumption of survivorship exists as between a father, seventy years of age, and his daughter, thirty-three years of age, each of whom perished in the same disaster. In the absence of all evidence of survivorship in such case, the presumption is that the death of each occurred at the same instant: *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518. This is the rule at common law in the absence of express statute to the contrary, but in Louisiana, where the civil law prevails, there is no presumption as to simultaneousness of death. Hence if a mother fifty-two years of age and her daughter aged thirty-five years perish in the same calamity, the latter is presumed to have been the survivor: *Succession of*

Langles, 105 La. 39, 29 South. 739. A presumption of survivorship may arise from facts in evidence. Thus, if a son of affectionate disposition and in the habit of writing frequently to his parents has not been heard from for nearly seven years prior to the death of his father, and was that long ago very ill with consumption, it will be presumed that his father outlived him: *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790. If a father and his son both disappear and are unheard of for seven years, the presumption is that both are dead, but there is no presumption that the father survived the son from the mere fact that he was seen or heard of later than the son when both have not been seen or heard of for more than seven years, and in such case property in which the father has a life estate and the son a vested remainder, but which would go to the father if he survived his son, must be distributed as the property of the son: *Schank v. Griffin*, 84 Md. 557, 36 Atl. 443.

**ESTATE AND GUARDIANSHIP OF MARGARET TOBELMANN,
AN INSANE PERSON.**

[No. 5894; decided March 25, 1887.]

Guardianship.—Where an Insane Person, While Sane, has selected a conservator of her property, the court should regard such selection as the expression of the wishes of a competent person, and, where the management of such agent has been prudent and judicious, the best interests of her estate will be promoted by continuing it in his hands.

Guardianship.—A Divorced Husband is a Stranger to a Proceeding for the appointment of a guardian of his former wife, an insane person, except so far as he is concerned in the succession of the children of the marriage to her estate.

Guardianship.—In an Application by a Divorced Husband for letters of guardianship of the person and estate of his former wife, an insane person, the decree of divorce must be taken as correct and conclusive.

J. C. Bates, for Martin J. Burke, applicant.

A. H. Loughborough, for F. Tobelmann, counter applicant.

COFFEY, J. On January 19, 1887, Martin J. Burke filed in this court a petition alleging that he is a resident of the

city and county of San Francisco, of the age of fifty years and upward, and was and had been for five years last past the agent and friend of Margaret Tobelmann; that said Margaret is a resident of San Francisco; that she is a single woman, having been divorced from Frederick Tobelmann, once her husband, on August 24, 1886, by a judgment and decree of the superior court of this city and county; that by the terms of the judgment and decree of divorce the issue of the marriage, to wit, Lizzie Tobelmann, of the age of eleven years, was awarded to the wife, said Margaret, and the boy Frederick was awarded to his father Frederick; that said Margaret has property situate in the city and county of San Francisco, consisting of money and real estate, described in said petition, which brings in an income of about \$400 per month; that said Margaret is now insane and under treatment for insanity in the Pacific Asylum at Stockton under the management of Dr. Asa Clark, and has been there since October 15, 1886; that she is not capable of taking care of herself and is mentally incompetent to manage her property, and that it is necessary that a proper person be appointed guardian of the person and property of said Margaret; that said petitioner, Martin J. Burke, was voluntarily selected by said Margaret as her agent to rent, lease and manage her property while sane, and that he is a competent, fit and proper person to have the care and management of said Margaret and her property, and that the petitioner verily believes that he is her choice; that he is the duly appointed, qualified and acting guardian of the person and estate of Christian A. Tittel, who is also an incompetent person, and who is a brother of said Margaret; that in consideration of the premises the petitioner prays that he may be appointed guardian of the person and estate of said Margaret Tobelmann.

On January 28, 1887, Frederick Tobelmann filed his petition setting forth that he was formerly the husband of said Margaret Tobelmann, and that he had always been a good and kind husband to her, but that actuated by an insane delusion that he had treated her cruelly she commenced an action for divorce against him, which resulted in the decree of

divorce mentioned in the petition of Martin J. Burke; that the said divorce was obtained upon false testimony given by her under the insane delusion aforesaid, and which the petitioner could not disprove further than by his own testimony; that the said decree of divorce has been subsequently modified so as to give to the petitioner the custody of the two children mentioned in the said petition of Martin J. Burke, and that the petitioner Frederick is the father and now has the custody of the said two children, both of whom are minors under the age of twelve years; that the said Margaret is insane; that she is a resident of the city and county of San Francisco, and is the owner of real estate yielding a monthly rental of about \$400; that she has about \$3,000 on deposit in bank and in the hands of Martin J. Burke at said city and county; that she is incompetent to manage her property by reason of her mental insanity; that the petitioner is over twenty-one years of age and a resident of said city and county; that the said Margaret has no guardian of her person and estate; and that the petitioner is the proper person to be appointed such guardian, and he prays to be so appointed.

These petitions came on to be heard at the same time, and evidence was introduced in support of each. It was shown by the evidence that Margaret Tobelmann was insane, and was at the time of the hearing and had been for some time prior thereto an inmate of the lunatic asylum, and was at the time of the application and hearing mentally incompetent to manage her own estate.

It was also shown by the judgment and decree of divorce alluded to in the petition of Martin J. Burke that she had been divorced, as in said petition alleged, from said Frederick, and that the custody of one of the children, Lizzie, had been awarded to her, and the custody of the other, Frederick, to her former husband, and that said judgment and decree had not been modified at the time of the hearing of this application. The value and character of her estate were also proved substantially as in both petitions set forth.

The question is, therefore, reduced to one of the relative fitness of the applicants for appointment as guardian. In considering this question I have examined, at the request of counsel, the evidence given in the divorce proceedings in order that I might have the benefit of all that was testified to at that time as to the relations between the applicant, Frederick Tobelmann, and his former wife, Margaret, and draw therefrom a conclusion as to his competency to be appointed in this proceeding guardian of her person and estate.

I see nothing in the testimony in that case to warrant the conclusion that the said divorce was obtained upon false testimony given by her under an insane delusion that Frederick had treated her cruelly, and I am not authorized, either in law or in fact, to declare that the decree of divorce in that case was founded upon false premises. I must accept that decree as correct and conclusive. The applicant, Frederick Tobelmann, therefore, is a stranger to this proceeding except so far as he is the father of the children of Margaret, and concerned for their succession to her estate. He prays to be appointed guardian of her person and estate.

Taking as true her testimony in the divorce case, as well as her testimony in this court in the matter of the guardianship of Christian A. Tittel, her brother, I should not feel justified in committing to her former husband the custody of the incompetent.

With reference to the estate, it does appear that while Margaret Tobelmann was presumably sane the petitioner, Martin J. Burke, was voluntarily selected by her as her agent to rent, lease and manage her property, and that he was, also, at her instance appointed, and is acting as guardian of the person and estate of Christian A. Tittel, the brother, also an incompetent. So far as has been brought to the attention of the court, his management of the estate has been prudent and judicious, and I think I am bound to regard the choice of Margaret Tobelmann, when she made selection of Martin J. Burke, as the expression of a person competent to select a conservator of her property.

As between these two applicants, without intending to cast any undue reflection upon Frederick Tobelmann, I am of opinion that the best interests of the estate would be promoted by continuing its care and custody in the hands of the one to whom it had been committed by Margaret Tobelmann while yet she was in presumptive possession of her mental faculties.

It is, therefore, ordered that the application of Martin J. Burke for letters of guardianship over the person and estate of Margaret Tobelmann be and it is granted; and it follows that the application of Frederick Tobelmann be and it is denied.

ESTATE OF DANIEL B. SPANGLER, DECEASED.

[No. 6243; decided May 28, 1888.]

Insanity of Testator—Opinion of Witness.—A witness called on behalf of the proponent of a will to prove the sanity of the testator, who is not an expert, is not qualified to give his opinion where he did not know that about the time of the execution of the will the testator had been adjudged dangerous to be at large, and was sent to the home of the inebriates, and shortly after to the state insane asylum; all he knew being based upon the fact that he never heard the testator's insanity questioned, and saw nothing particularly wrong about his mind.

Insanity of Testator.—Upon the Issue of Sanity Raised by a Contest to the probate of a will, the court is concerned only with the *fact* of insanity, whatever cause the insanity may have proceeded from being immaterial.

Insanity of Testator.—The Instrument Propounded as a Will should itself be considered in connection with other evidence, upon the issue of the testator's sanity.

Insanity of Testator—Injustice of Will.—Where the testator's estate was small, and he left nothing to his wife, who had been his spouse for twenty-five years, and was aged and infirm, remitting her to her community rights, but bequeathed all his estate to strangers, this fact may be considered as evidence in connection with other facts and testimony, upon the issue as to the insanity of testator.

Insanity of Testator—When Established by Evidence.—Where a will gives all the estate of the testator to strangers, remitting the widow to her community rights, the probate thereof should be de-

nied if it appears that the testator while young became insane and was confined to a straight-jacket for six months; that he had a brother and cousin who were insane; that he embraced spiritualism a few years before his death and did many strange things under alleged spiritualistic influences; that he had a great many peculiar beliefs; that less than a month after making his will he was sent to the home of inebriates as dangerously insane, and nine days thereafter was formally adjudged insane and sent to the state asylum.

Ash & Mathews, for the contestant.

W. H. Bodfish, for the proponents.

COFFEY, J. The sole issue in this controversy is the sanity of the testator. A paper, purporting to be a will made by Daniel B. Spangler, was filed in this court May 12, 1887, accompanied by a petition of H. H. Lynch, who is named in said instrument as executor, reciting that the testator died May 7, 1887, at Napa City, California, being a resident at the time of San Francisco, and leaving estate therein consisting of real and personal property of the aggregate value of about \$6000. The testator left him surviving a wife, Catherine Spangler, but no children. At the time of making the will, February 17, 1887, the testator was about the age of fifty-four years. The operative items of the will are as follows:

"First: I declare that all the property which I now possess, both real and personal, is community property; therefore, my wife, Catherine Spangler, will be entitled, under the law, to the one-half thereof. I therefore make no further provision for her.

"Secondly: I give and bequeath to Mrs. Ella Lynch, wife of H. H. Lynch, now residing in the City and County of San Francisco, the sum of two thousand dollars.

"Thirdly: I give and bequeath to my friend, George T. Shaw, residing in said city and county, the sum of five hundred dollars.

"Fourthly: I give and bequeath to my friend, Charles Mead, of said city and county, the sum of two hundred and fifty dollars.

"Fifthly: I direct that my executors, hereinafter named, sell my real estate at such time as to them may seem best, and out of the proceeds thereof pay the several legatees the sums of money hereinabove named."

The widow contests the probate of the will upon the ground that at the date of its execution, and for a long time prior thereto, the testator was not of a sound and disposing mind, and not competent to make a will by reason of insanity; and the proponent denies the allegation of insanity, and avers that the testator, at the date of the execution of the will and prior thereto, was of sound and disposing mind and memory, and fully understood the nature and character of the document executed, and comprehended its contents, and executed the same of his own free will.

In support of the allegation of insanity there is an abundance of evidence. The testator died in the insane asylum at Napa, on the 7th of May, 1887; to which institution he had been committed on the 22d of March, having been apprehended for insanity on the 13th of March, and detained in the Home of the Inebriates, in San Francisco, from that time until his commitment to the State Asylum. There were present at the time of the commitment as witnesses and as spectators: George T. Shaw, W. H. Bodfish, Mr. and Mrs. Mead and Dr. McLaughlin. An examination was made by the physicians appointed by the court for that purpose, and it appears from the record certified to by them, and by the judge that Mr. Spangler had certain delusions, stated as follows: "He is a walking electric battery; has invented a code of signals; communes with the other world; can pump himself full of wind, which he can impart to others; wants to make a chimney of one of his teeth. First indications occurred about six months ago." This appears in the certificate attached to the commitment, and the record shows that the witnesses sworn and examined on that occasion were Dr. McLaughlin and George T. Shaw. The latter gentleman was named in the paper offered as a will as an executor, but renounced that trust. He appears in the will as a legatee for a small amount, and also appeared as a witness in support

of the will in the contest, at which time he testified substantially that he felt perfectly confident in the soundness of the testator's mind in regard to all business transactions at the time of the making of the will.

Mr. John F. Kennedy, a subscribing witness to the document, testified that at the time of that transaction in his judgment the testator was entirely sound of mind; he had never heard Mr. Spangler's sanity questioned.

Charles H. Mead, who is a legatee in the will, testified that on the morning of the making of the will, when the deceased called him to send for Mr. Lynch, Mr. Shaw and Mr. Bodfish, the witness never saw a more rational man in the whole world than he was.

Mrs. Adelaide Mead, wife of the last named gentleman, corroborated his evidence.

Mr. Bodfish, the attorney who drew the document offered by the proponent as the will of Daniel B. Spangler, testified that said Spangler was a client of his for several years before his death, that he saw him frequently about different matters of business; that he believed him to have been of sound and disposing mind at the time he signed the will, as he talked upon the subject matter of the will intelligently, gave him directions how to draw the will, and the will was drawn in conformity with his directions. Twenty-five days elapsed from the date of the will, February 17, 1887, until the testator was committed to the home of the inebriates, March 13, 1887, on a charge of insanity, and nine days more elapsed until he was committed to the lunatic asylum, March 22, 1887.

The record shows that Dr. McLaughlin, a witness for contestant, and George T. Shaw, above referred to, a witness for the proponent, were sworn and examined, and that W. H. Bodfish and Mr. and Mrs. Mead, all witnesses for proponent, were present upon the occasion of the examination of testator. The complaint was made by Doctor Moses A. McLaughlin; and from his testimony, and that of George T. Shaw, witnesses who had frequent intercourse with the accused during the time of the alleged insanity, and upon the certificate of Doctors J. M. Eaton and E. Windele, graduates in medicine, and after a personal examination of the accused, and being him-

self satisfied the accused was committed by the judge to the insane asylum at Napa.

The certificate of the physicians sets forth that the attack from which he was suffering at the time of the examination first appeared about the 7th of February, ten days before the making of the will, and that other attacks occurred about six months previously.

This was the result of a judicial proceeding as recorded in the Book of Insane Commitments, Volume XV, Superior Court, folio 113. On that day he was solemnly adjudged to be an insane man, and there is no escape from the conclusion that four of the witnesses in behalf of the proponent believed, at that time and place, that the statements in the certificate of the examining physicians, and of the commitment, were the truth, and that the insane attack from which he suffered on March 22, 1887, first appeared February 7, 1887, and that there were other attacks six months previously, and that all of this period included the time at which he signed his name to the paper here propounded. It is clear that their opinion upon the 22d of March, 1887, was that this man was insane on the 7th of February, 1887, and that that insanity continued until the time of his commitment. If we conclude that their opinion when testifying as witnesses for the proponent was correct, we must reject the evidence elicited from them, or given in their presence, upon which the man was committed, as a dangerously insane lunatic, to the asylum on the 22d of March. Accepting either horn of the dilemma, their opinions as to the sanity of this man at the time he signed the instrument here propounded, as against the testimony for the contestants, must fall.

The remaining witness, Mr. Kennedy, was unquestionably honest in his testimony, but erroneous in his opinion, as to the sanity of this man. A careful examination of his testimony shows that his observation was not sufficient to justify the deduction that the decedent was of sound mind at the time of this transaction; he was called to the place where the instrument was executed through a telephone message from his partner, Mr. Shaw; he had very little conversation with the decedent; he may have talked casually with him about elec-

tricity at some time, but on the morning of the day that the paper was signed he had no conversation with him only to inquire after his health; the decedent did not ask the witness any questions, nor did the witness ask any questions of him, except to ask him how he was; the witness was present probably about an hour altogether, and all that he was doing was trying to dry his feet at the fire, having become wet on the way. Mr. Bodfish was there when the witness arrived; the witness was about to leave just after he asked him how he was, but Mr. Bodfish asked him to stay and witness the will, which he was then writing. The witness did not visit the deceased when he was at the home of the inebriates, nor was he present at the time he was committed to Napa, and did not know anything about those circumstances, and as witness never heard the man's sanity questioned, and did not see anything particularly wrong about his mind, he concluded that the decedent was all right, and he based his opinion upon these premises; but witness was not an expert, and it never entered his mind that decedent was all wrong. Clearly, Mr. Kennedy erred in his opinion of the mental condition of the decedent. The premises upon which he proceeded were quite insufficient to justify the conclusion that the decedent was sane, and he does not positively so declare; he simply assumed the sanity because he had never heard anything to the contrary and saw nothing particularly wrong about the man. It is unnecessary to enter into a minute analysis of the testimony for the contestants. It is sufficient to refer to the testimony as given in the transcript, much of which is of such a character that it would be neither palatable nor profitable to expose it in this opinion.

The following is, I think, a correct summary of the conduct, condition and record of Daniel B. Spangler, the decedent: When he was a young man he became insane and had to be confined in a straight-jacket for six months; his brother died while insane; he had a cousin who was insane; he embraced spiritualism a few years prior to his death; he attended meetings, would come home late at night; on some occasions he would complain of being too hot; he would get up at late hours of the night and go out into the yard and lie down with-

out any clothing, sometimes all night, and refused to go into the house; he would wake up at night screaming with fright, and tell his wife that he thought Lynch was going to kill him for something that took place between himself and Lynch's wife, and told his wife that he must leave the state for a while on account of the anticipated trouble with Lynch.

He voluntarily separated from his wife when he was taken sick, there being no cause therefor, and took up his residence in a lodging-house; told his acquaintances that he had struck something new, that he had received a communication from Judge Templeton (who had been dead for some years) to build a wagon of peculiar style to travel with in the country, by which he would make \$1,000 per month; he told the physicians who attended him that he was being treated by mediums and spirits of a deceased person; he actually built the wagon at an expense of \$800; he tried to extract one of his teeth with his fingers; he claimed to be heavily charged with electricity, tried to throw it off and communicate it to others by rubbing one hand rapidly down his arm and then take hold of the hand to give direct communication that way; he does not believe the physician's statement about his disease, but affirms that his gums are all honey-combed, and if he had a chimney in one of his teeth he would be all right. He is forgetful, and declares that he has taken medicine when he has not taken it, and refused to be convinced even when shown the box containing the medicine; he refused to take medicine until he received a communication to do so; he closed his eyes and told the person present to wait, he was getting a communication from Judge Templeton; he stated that Judge Templeton's spirit had control of him; he says he is treated by a certain woman, a medium, who tells him how much sexual intercourse he must have to rid himself of surplus electricity, he is restless, wandering in conversation, forgetful and sleepless; he refers to his favorite topic of conversation, spiritualism and electricity, on all occasions; it takes the most powerful opiate to quiet him; and his physical condition is failing rapidly, and his mental condition continually, and there is no hope for improvement in either. In this condi-

tion he was taken to the house of Mr. Mead on the seventh day of February, 1887; his condition does not improve, but continues to grow worse. A nurse is employed to attend him during the night. He complains of being too warm, directs the nurse to hold the bedclothing up so he can have what he calls a free circulation of air. He then makes great effort to relieve himself of electricity; he refuses medicine until he can get a communication whether to take it or not; he removed all his clothing and applied his person to the fire in a grate, declaring that his lungs had refused to pump air, and he must get them in order to do so; he refused to go to his bed until after he had received a communication to go. He talks on the subject of electricity and spiritualism continually; he sleeps but little and that sleep is a restless, muttering sleep. The nurse is with him only about a week, after which he is sent to the home of the inebriates, where the same evidences of insanity continue, and he is examined by the inquisitors in insanity, and committed to the asylum for the insane, where he died May 7, 1887, without any improvement or change in his mental or physical condition.

With the cause of the decedent's insanity the court is not concerned in this inquiry; it is the fact of insanity, from whatsoever cause it did proceed, and that fact is here clearly established. Dr. McLaughlin, who attended the deceased from August to October, 1886, while he was at the Tremont House, said he was there emaciated and suffering and weak; in the opinion of this doctor the decedent was insane; he was trying to drill a hole into one of his teeth and said that would cure him, and other things of the same class. At the time the decedent was examined on the charge of insanity he imagined himself a gasometer or an electrometer, on which account he expected to be employed by the government, on the Coast Survey. He was failing rapidly, especially mentally. Dr. Jewell, superintendent of the home of inebriates, testified that the decedent was insane while there. Dr. Castelhun, who called the day the will was made, testified that the decedent was very sick, that his brain was diseased and his mind was influenced thereby, and that the cause of the disease of the

brain was chronic alcoholism. These are professional physicians of ability and experience and close observation of the particular subject. They are more than ordinary experts; they testify directly to phenomena observed by themselves, aided by their special training to arrive at accurate results and correct opinion, and they are amply corroborated by the testimony of nine or ten other witnesses on the part of the contestants, including Dr. Brown, the physician who attended the witness at the Trenton House, up to February 18 to the 24, 1887; C. A. Bragdon, the nurse who attended him from February 18 to the 24, 1887, and the others. The instrument propounded as a will should itself be considered in connection with other evidence. It is not clear at all to my mind why the deceased should, in disposing of so small an estate, divert from the natural object of his bounty, an aged and afflicted wife, remitting her to her community rights.

In this case all legatees are strangers to the testator; there is no reason given why they should be considered in preference to the widow; and there was especial reason why she should be the recipient of his entire estate, because of her age and infirmity. She had been his wife for twenty-five years, and no reason appearing to the contrary for discarding her, it was she, and not strangers, who should have his estate. The decision now announced was the one which the court was prepared to declare upon the submission of this cause, as was clearly intimated to the counsel for the proponents; but for the reason that the latter urgently asked of the court a studious consideration of the points presented by him and the authorities supporting them, and a further review of the testimony, the court has chosen to examine again and again the evidence so subtly analyzed, and the argument so ably presented by the counsel for proponents; but this reconsideration and re-examination of evidence, authorities and arguments serve solely to fortify the original opinion, orally intimated at the conclusion of the trial, that the decedent, Spangler, at the time he signed the instrument here propounded, and for a long time prior thereto, and subsequently until he died in the insane asylum, was mentally incapable of making a will;

and the instrument here propounded should be and it is hereby denied probate.

Let an order be entered accordingly.

The Internal Evidence of a will itself may be of great importance as indicating the testator's mental condition and soundness of mind: Estate of Dolbeer, 149 Cal. 227, 86 Pac. 695. "If the testamentary disposition be in itself consistent with the situation of the testator, and in congruity with his affections and previous declarations; if it be such as might have been naturally expected from one so situated, this is in itself rational and legal evidence of no small weight to testamentary capacity, whilst the reverse will alone furnish occasion of doubt, demanding evidence to refute it. The rationality of the act goes to show the reason of the person": Stewart v. Lispenard, 26 Wend. 255, 313, per Senator Verplanck, approved in Estate of Shafter, 35 Colo. 578, 117 Am. St. Rep. 216, 85 Pac. 688, 6 L. R. A., N. S., 575.

A Belief in Spiritualism is no evidence of insanity, although clearly one may be a monomaniac on that subject, just as he may be on any other: Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306; Estate of Spencer, 96 Cal. 448, 31 Pac. 453; Owen v. Crumbaugh, 228 Ill. 380, 119 Am. St. Rep. 442, 81 N. E. 1044; Buchanan v. Pierie, 205 Pa. 123, 97 Am. St. Rep. 725, 54 Atl. 583; Orchardson v. Coffield, 171 Ill. 14, 63 Am. St. Rep. 211, 40 L. R. A. 256, and note to People v. Hubert, 63 Am. St. Rep. 91.

A Will is not Invalid Because It may Appear Unwise, Unjust, or unnatural in its provisions, for the law does not make the right of testamentary disposition dependent upon its judicious exercise. Nevertheless, the injustice or unnaturalness of a will is a circumstance which may be considered with other evidence tending to show, on the part of the testator, an unbalanced mind or a mind susceptible to or swayed by undue influence: 1 Ross on Probate Law and Practice, 64.

ESTATE OF ALMIRA W. WHEELER, DECEASED.

[No. 6264; decided February 9, 1888.]

Reference of Claim—Objection to Evidence.—Assuming that section 1880, Code of Civil Procedure, applies to the case of a referred claim against a decedent's estate, yet unless the objection to the claimant's evidence is taken before the referee, it cannot be urged afterward.

Reference of Claim—Sufficiency of Evidence.—Where a claim presented against a decedent's estate is, by stipulation of the executor and claimant, referred to a designated person "to ascertain its accuracy and report the same," and, upon the reference, the referee is notified by the executor that he has no testimony to offer and does not desire to be present at the examination, and the claim is fully substantiated by the oral testimony of the claimant, and bills and memoranda, and witnesses in corroboration of his evidence, an objection to the referee's report on the ground that the claimant's evidence was inadmissible under section 1880, Code of Civil Procedure, cannot be sustained.

E. N. Deuprey, for claimant.

Wilson & Wilson, for executor, opposing the claim.

COFFEY, J. Pursuant to an agreement in writing between Ben Morgan, executor, and Edgar W. Hawkins, claimant, under section 1507, Code of Civil Procedure, and approved by the court, this claim was referred to Edmund Tauszky, a court commissioner, on September 18, 1887. Afterward, to wit, on October 18, 1887, the report of the referee, recommending the allowance of the claim, was filed in this court, and on November 17, 1887, exceptions and objections were filed on behalf of the executor to the report and to the recommendation, upon the ground that the evidence supporting the claim, being that of the claimant, was inadmissible under subdivision 3, section 1880, Code of Civil Procedure, which reads:

[“The following persons cannot be witnesses . . .”].
“Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand

against the estate of a deceased person as to any matter of fact accruing before the death of such deceased person."

Assuming the applicability of the section cited to such a case as this, it is my opinion that the objection is not now in order. No objection was made at the hearing. The testimony was given without any opposition or objection from the executor, or by anyone representing him.

The agreement to refer this claim is as follows, omitting the title of court and proceeding:

"Whereas, Edgar W. Hawkins has presented a claim against the above-entitled estate, amounting to the sum of \$897; and, whereas, the executor of said estate, Ben Morgan, and said Hawkins have agreed to refer said claim to Edmund Tauszky, Esq., to ascertain its accuracy and report the same to this court, we hereby agree to the making of an order by the court, referring said claim to said Tauszky.

"BEN MORGAN,

"Executor of the Will of A. W. Wheeler, Deceased.

"E. W. HAWKINS,

"Claimant."

Under this approved agreement, testimony was taken by the referee on behalf of the claimants, and three days were occupied in the work of the reference. The executor notified the referee that he had no testimony to offer, and did not desire to be present at the examination of the claimant's witnesses. The claim presented was an alleged balance due to claimant for money loaned, and paid out and expended on behalf of the deceased, at her request, by the claimant, between October, 1886, and May, 1887. The claimant had a right to expect that, if objection were contemplated, it would be offered at the hearing; and it seems to me that he had a right now to claim that the executor is estopped from urging an objection which was not suggested before the referee.

The referee says that every item of the claim is substantiated by the oral testimony and the bills and the book of the claimant, and that his testimony has not been contradicted. The referee reports that the claimant establishes that he loaned

to the decedent the sum mentioned in the claim, and paid out the other amounts contained therein at her request, and he has only received the sum of two hundred (200) dollars on account of such loans and disbursements; that there is no reason to doubt the truth of the statements of the claimant, and, in the absence of all contrary evidence, nothing remains for the referee to do but to recommend the claim to be allowed as presented, which he accordingly does by his report. In my opinion the referee's report should be confirmed, and it is so ordered.

ESTATE OF ELIZABETH R. CHAPPELLE, DECEASED.

[No. 3495; decided August 28, 1884.]

Trustee — Accounting to Probate Court.—One who is the trustee of a person since deceased, under an express trust voluntarily assumed in the lifetime of the decedent, cannot, by virtue of the Code of Civil Procedure, section 1461, be ordered to account before the court wherein the administration of the decedent's estate is pending.

In the above-entitled matter, John P. Poole, the administrator of the estate, presented to the court, and filed on August 5, 1884, a petition showing that the decedent, on January 15, 1882, placed in trust with H. L. Hutchinson, of San Francisco, the sum of \$5,200; that the petitioner had in his possession a written instrument showing this, and annexed to the petition as an exhibit a copy of the aforesaid instrument, which was in the following language:

“San Francisco, January 15, 1882.

“Received of Mrs. Lizzie R. Chappelle, fifty-two hundred dollars (\$5,200), in trust, and for investment for her account.

“H. L. HUTCHINSON.”

The petition prayed that the said Hutchinson be ordered to make answer, and render an account. Citation was issued upon the petition, and thereafter an answer was filed by Hutchinson, setting up that the petition and citation were

insufficient to justify a grant of the relief prayed for. Upon the hearing of the matter, counsel for Mr. Hutchinson moved to dismiss the petition, on the ground that the proceeding was not authorized by law; that the petition was based on section 1461 of the Code of Civil Procedure, which section referred to a party holding property in trust for an administrator or executor; but that this could not apply to one receiving money from a decedent in his lifetime. For the petitioner it was claimed that, as Hutchinson held the money in trust for Mrs. Chappelle in her lifetime, he became a trustee for her administrator upon the latter's appointment. The court, after hearing argument, suggested that the proceeding was not a proper one; subsequently, on August 28, 1884, a written dismissal of the petition was filed by the attorneys for the administrator. The following is the text of section 1461, Code of Civil Procedure, viz.:

"The Superior Court, or a Judge thereof, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent to appear before such Court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the Court may proceed against him as provided in the preceding section" (which section provides that a party may be committed to jail for failure to respond to a citation).

Thornton & Merzbach, for petitioner.

T. C. Coogan, contra.

COFFEY, J. Petition dismissed.

ESTATE OF ROBERT JOYCE TIFFANY, DECEASED.

[No. 5317; decided May 22, 1888.]

Will Contest.—A Contest of Probate of a Will Partakes of the Nature of a civil action; its issues and results being determined and applied in like manner.

Special Administrator.—Two Items for Expert Witnesses were in this case disallowed in the account of a special administrator.

A Special Administrator is Without Power to Incur Expense in and about a will contest.

A Special Administrator has no Authority to Make Expenditures as to claims having their origin in decedent's lifetime.

Special Administrators are Entitled to Counsel in the Administration of their trust.

Special Administrators are Entitled to Compensation for services performed in discharging the duties of their trust.

Will Contest—Allowance for Expenses.—There is a Distinction Between a Successful and an unsuccessful contest of a probate of will, as to the proponent's right to expenses incurred. Where a purported will has been refused probate, and so declared invalid, no rights or duties thereunder can be pretended.

Will Contest—Allowance for Expenses.—There is no warrant in the statute for an allowance of expenses incurred by the proponent of a purported will which has been refused probate, and jurisdiction in such matters cannot be sought for outside the code.

Will Contest—Costs and Counsel Fees.—Section 1332, Code of Civil Procedure, as to costs of a probate contest, if including counsel fees, is applicable solely to contests after probate first had, and does not embrace a contest upon the original propounding of a purported will.

Coogan & Foote, for the heirs, contestants.

E. N. Deuprey, for the proponent of purported will.

COFFEY, J. 1. A contest of the probate of a will partakes of the nature of a civil action; and the issues and results are determined and applied in like manner: Code Civ. Proc., secs. 1033, 1716.

With the exception of the two items—Expert, \$27.50, and Expert, \$50—the bill should be allowed; and, as to those two items, there should be deducted therefrom in each case all but one day's witness fee.

2. The exceptions to the account of the special administrators should be allowed. Section 1415, Code of Civil Procedure, does not authorize the allowance of expenses incurred in and about a will contest, nor claims which had their origin in the lifetime of the decedent. In the Estate of Cynthia Hoff Shillaber, Deceased (No. 4015, Superior Court, Probate, Coffey, J.), this court has given its views upon the powers and duties of special administrators, and also in the Estate of Hannah M. Sackett (No. 6775, Superior Court, Probate, Coffey, J.) The special administrators are entitled to the aid of counsel to assist them in discharging their special functions, as prescribed in section 1415, Code of Civil Procedure, and to reasonable compensation for their own services.

3. In the matter of the Estate of Gershom P. Jessup (No. 5681, Superior Court, Department 9, Probate) this court had occasion to consider, in connection with the account of the executors, the brief filed by Mr. Deuprey upon this application, the subject matter in both cases being of a cognate character. I am entirely satisfied with the correctness of the conclusion reached by the court in that case. The fallacy of the argument for the applicant in this case lies in the assumption that a person named in a will as executor, who fails to establish the validity of the instrument, is, with reference to the subject matter of this application, in as good a position as a proponent who succeeds. There is an important distinction and difference between the two cases, and I have discovered no case in the reports of this state which sustains the proposition presented by the applicant here, where the proponent has failed in the first instance to establish as a will the paper which is a basis of his claim. Here and elsewhere the contrary has been determined as the correct legal principle. The proponents here never have been executors. The paper upon which they predicated their petition to be so appointed has been declared invalid, and consequently their nomination therein was and is void; and upon an invalid instrument and a void nomination manifestly no right can attach nor any claim accrue. In *Mumper's Appeal*, 3 Watts & S. 443; in *Royer's Appeal*, 13 Pa. 574; in *Andrew's Executors v. His Administrators*, 7 Ohio St. 143; and in *Leaven-*

worth v. Marshall, 19 Conn. 408, the doctrine has been declared in substantial conformity with the views herein expressed. But, even if I were doubtful of the application of those cases to this subject matter, I should be bound by the statute, after a full examination, to sustain the demurrer, for the reason that I have found nowhere in the code any warrant to entertain an application of this kind, and jurisdiction in such matters is not to be sought elsewhere. Section 1332, Code of Civil Procedure, even if its terms could be enlarged to include counsel fees, refers expressly to a contest after probate where the probate is revoked, and in the cases decided by me which are cited by applicant (*Estate of Chittenden*, 1 Cof. Pro. Dec. 1, and *Estate of Fisher*, 1 Cof. Pro. Dec. 97), the wills had been admitted to probate.

Demurrer sustained.

Where There is a Successful Contest of a will before probate, but the legatees or executor acted in good faith and upon reasonable grounds in proposing the will for probate, the court may, in its discretion, allow the unsuccessful proponents their costs in attempting to establish the will, and make the same a charge against the estate: *Estate of Olmstead*, 120 Cal. 452, 52 Pac. 804. On the other hand, when there has been an unsuccessful contest against the admission of a will to probate, the court may allow the defeated contestant his costs to be paid out of the estate, but it will exercise its discretion in his favor in this respect only in rare cases, and when he has acted in the utmost good faith in waging the contest: *Estate of Bump*, 152 Cal. 271, 92 Pac. 642.

The Fees and Expenses of Contests after the probate of a will must, under the statutes of most states, be paid by the contestant, if the probate is affirmed; but if the probate is revoked, the costs must be paid by the party who resisted the contest, or out of the property of the decedent, as the court directs: Cal. Code Civ. Proc. 1332; Ariz. Rev. Stats. 1627; Idaho Rev. Stats. 5323; Mont. Code Civ. Proc. 2365; Okl. Rev. Stats. 1512; S. D. Pro. Cd. 60; Wyo. Rev. Stats. 4612. A court has no authority, before the admission of a will to probate, to appropriate the funds of the estate to aid either the proponent or the contestant. Neither has it authority, while a contest to revoke the probate is still pending and undetermined, to allow the executor, in his annual account, for expenditures in defending the will. But when a contest after probate has been successfully waged, the law makes it the duty of the court to determine whether the costs shall be paid by those who resisted the revocation or out of the assets of the estate; and if the court, in the

exercise of its discretion, decides that the costs shall not be paid out of the estate, its determination will not be reversed on appeal. An executor who is unsuccessful in resisting the revocation of a probate is not entitled, as a matter of right, to the costs he has incurred, but the court is vested with discretion to determine whether he or the estate shall bear them: *Estate of McKinney*, 112 Cal. 447, 44 Pac. 743; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Estate of Dillon*, 149 Cal. 683, 87 Pac. 379.

ESTATE OF ELI JASPER BURNS, DECEASED.

[No. 6426; decided June 30, 1880.]

Reference of Claim—Manner of Conducting.—Where an executor or administrator doubts the correctness of a claim presented to him, and a reference is had pursuant to section 1507, Code of Civil Procedure, the reference must be conducted as provided in section 1508 and sections 638-645, Code of Civil Procedure.

Reference of Claim—Testimony Against Executor.—The reference of a doubtful claim is "a proceeding prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person," and subdivision 3, section 1880, Code of Civil Procedure, applies, so that the claimant prosecuting cannot testify "as to any matter of fact occurring before the death of such deceased person."

M. T. Moses, for estate.

Geo. F. Hoeffler, for claimant, contra.

COFFEY, J. Construction of sections 1507 and 1508, Code of Civil Procedure, 638, 645, Code of Civil Procedure, and section 1880, subdivision 3, same code. Sections 1494, 2002, 2009, 2019, Code of Civil Procedure, considered in connection with affidavit to claim.

The reference herein was pursuant to section 1507, Code of Civil Procedure, and the rule for conducting such reference is found in the next section, 1508, Code of Civil Procedure, and in sections 638 to 645, of the same code. Hence it follows that subdivision 3 of section 1880 applies, incapacitating the claimant from testifying in his own behalf. This is "a

proceeding prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person," and the claimant prosecuting may not testify "as to any matter of fact occurring before the death of such deceased person."

I have read the brief of counsel for claimant with care, but it fails to enforce conviction that his view is correct. With equal care I have considered the opposing argument, and believe it states the law correctly. The testimony of claimant having been objected to in proper time and form, must be disregarded.

IS AN AFFIDAVIT TO A CLAIM EVIDENCE?

Counsel for claimant devotes much space to an attempt to show that the affidavit required by section 1494, Code of Civil Procedure, to be made in support of a claim against an estate, is evidence tending to prove the validity of such claim.

Even if he be correct in this position, what has it to do with the only question to be determined here, namely: Did the referee err in sustaining the objection to the testimony of the claimant Manheim? And if the claim, with such affidavit annexed, is or may be evidence, it does not appear that claimant offered it in evidence before the referee, or that the referee struck it out, or disregarded it, or refused to receive it.

Counsel endeavors to draw a distinction between the verification of a complaint and the verification of a claim against an estate of a deceased person, to the advantage of the latter. But as a complaint may be good without verification, and a claim against an estate never can be, the advantage is surely with the claim, and the law has given it greater dignity and placed it upon higher ground. A complaint is a statement of a plaintiff's claim; but is the complaint, whether verified or not, evidence upon the trial of that claim?

It may be that

THE AFFIDAVIT IS TO SOME EXTENT EVIDENCE.

So is the written claim itself. But they are only evidence to be addressed to the executor or administrator. It cannot

be successfully contended that either of them would be competent evidence of the validity of such claim on a trial in which such claim was disputed.

The administrator represents the creditors, and the provision requiring that claims be sworn to is simply to afford greater protection to the heirs and to furnish better means of preventing fictitious and unconscionable demands being made against the estate by claimants and paid by their representative, the administrator.

If it be true, as asserted by claimant's counsel, that prior to the act of March 30, 1872, such claims did not have to be sworn to, it is difficult to see that that act had any other purpose than the protection of estates just mentioned. Surely the legislature did not intend that the addition of an affidavit to what was before incompetent evidence should make it competent evidence upon the trial of disputed claims. A change in the long-settled and well-established rules of evidence is not to be made by inference.

THE TESTIMONY OF WITNESSES

Is taken in three modes: 1. By affidavit; 2. By deposition; 3. By oral examination: Code Civ. Proc., sec. 2002.

In all cases other than those mentioned in section 2009, where a written declaration under oath is used, it must be by deposition: Code Civ. Proc., sec. 2019.

Section 2009, Code of Civil Procedure, provides that "an affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, . . . and in any other case expressly permitted by some other provision of this code."

If counsel for claimant contends that there is any express provision of the code making the affidavit to a claim against the decedent evidence or testimony of the legality of such claim, he has failed to point it out.

COMPETENCY OF CLAIMANT AS A WITNESS.

Was the claimant, David Manheim, a competent witness upon the trial before the referee of the validity of his claim?

The answer to this question depends upon the construction to be given sections 1880, 1507 and 1508 of the Code of Civil Procedure.

A statute is to be given such a construction, if possible, as will give it effect.

The effect and consequences and the reason and intent are to govern in the construction of statutes.

Is this an "action" or "proceeding," and is it against an administrator, within the meaning of section 1880, Code of Civil Procedure?

REFERENCES UNDER THE CODE.

This case is a reference made under section 1507, Code of Civil Procedure. It is a legal proceeding, having for its sole authority that section of the Code of Civil Procedure. The consent of the claimant and the administrator extends only to the method of the trial of the issue between the parties, the same as in other cases of reference and as in cases of arbitration. Section 638 and 1281, Code of Civil Procedure et seq., also section 1508, Code of Civil Procedure: "The same proceedings shall be had in all respects . . . as in other cases of reference."

As it is a reference under the code, it must be subject to the provisions of the code.

It must be a "judicial remedy," for judicial remedies are such as are administered by the courts of justice or by judicial officers, empowered for that purpose by the constitution and statutes of this state: Code Civ. Proc., sec. 20.

DIVISION OF JUDICIAL REMEDIES.

These remedies are divided into two classes: 1. "Actions; and 2. Special proceedings": Code Civ. Proc., sec. 21.

AN ACTION.

"An action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense": Code Civ. Proc., sec. 22.

A SPECIAL PROCEEDING.

"Every other remedy is a special proceeding": Code Civ. Proc., sec. 23.

Now, this reference is a proceeding or remedy provided for in the same statute in which we find these provisions; so it must be either an action or a special proceeding.

It is part of the duty of an administrator, in winding up an estate, to allow or pay no claim against it which is not a legal, bona fide and existing indebtedness; otherwise he would not be responsible to the heir (as he is) for claims unlawfully allowed and paid by him. To protect himself in this respect the administrator must, before he allows a claim, be satisfied of its "correctness." When he is not satisfied of its correctness it is his duty to reject it. But to facilitate the winding up of estates, to save the loss of time and expenditure of money incident to ordinary litigation, the statute (Code Civ. Proc., sec. 1507) provides that, where the administrator is not satisfied of, or, to use its own stronger words, "doubts" the correctness of any claim, he may agree—to do what? to the trial by a referee, instead of by the court, in the ordinary way of—what? not the amount due on an admitted claim, but

"THE MATTER IN CONTROVERSY."

Section 1508 makes it the duty of the referee to "hear and determine the matter." The only effect and purpose of these provisions is to change the tribunal or judicial officer before whom the trial of the matter shall be had.

No question has been raised as to the constitutionality of sections 1507 and 1508. If there had been, it would be the duty of the court to construe them, if possible, so that they might stand. "No person can be deprived of his life, liberty or property without due process of law." The court may enter judgment upon the report of the referee, and such judgment "shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process." Code Civ. Proc., sec. 1508.

HOW THE STATUTE REGARDS THIS PROCEEDING.

Observe that the statute seems to regard this proceeding as a "suit"; if not, why were the words "commenced by ordinary process" added in the clause last cited? If this proceeding was not to be considered as a "suit," that clause would have been complete if it had simply read "such judgment shall be as valid as if the same had been rendered in a suit."

This seems an appropriate place to refer to counsel's remarks relative to the process in actions and proceedings. He says that in the one case defendant is brought in by means of a "summons," and in the other by "an order to show cause." If this were strictly true, it would be immaterial in the present matter; but it is not true.

In the matter of contested elections—special proceedings—the defendant is brought in by a citation: Code Civ. Proc., sec. 1119.

In "confession of judgment"—a special proceeding—no process is issued: Code Civ. Proc., secs. 1132-1135.

In "submitting a controversy without action"—a special proceeding—no process is issued: Code Civ. Proc., sec. 1138 et seq.

In "forcible entry"—special proceedings—a summons is issued to bring the defendant into court.

So, also, is a summons used in proceedings for the enforcement of liens: Code Civ. Proc., secs. 1190, 1191.

In the punishment of contempts not committed in the immediate view and presence of the court or judge—a special proceeding—a warrant of attachment may be issued: Code Civ. Proc., sec. 1212.

In the "voluntary dissolution of corporations," publication of a notice is resorted to: Code Civ. Proc., sec. 1230.

In proceedings for the exercise of the right of eminent domain, a summons is issued: Code Civ. Proc., sec. 1243.

In the matter of escheated estates, a summons is issued: Code Civ. Proc., sec. 1269.

Notice of applications for the change of names is given by publication: Code Civ. Proc., secs. 1276, 1277.

In arbitrations (Code Civ. Proc., sec. 1281 et seq.), a closely analogous proceeding to the one had in this case, no process is used for bringing in the parties. And the reason why none is used either in the matter of arbitrations, references or agreed cases, is obvious, that no process is necessary to bring in a party who by his agreement has already brought himself before the judicial officer or tribunal.

The object of process is to get the parties before the court—why issue it when they are already there? And being there, whether voluntarily, or in obedience to process, the court or officer, if possessing jurisdiction of the subject matter, can render a judgment “valid and effectual” and binding upon the parties.

As before remarked, the sole effect of the agreement to refer by the administrator and claimant was to change the tribunal or judicial officer before whom the trial of the disputed question was to be had. It did not change the status of the parties. They were still adverse. The claimant remained the plaintiff, and the administrator remained the defendant, which, being so, made this “an action or proceeding against an administrator.” Natural reason must and does produce this conclusion, and our supreme court have repeatedly in their decisions, either in effect or in express terms, so held in cases of reference and arbitration.

In *Tyson v. Wells*, 2 Cal. 130, the court said: “The parties agreed in writing to submit the matter in dispute between them to certain arbitrators, and the agreement was filed among the papers in the case in the court below. In addition an order of court was granted, by consent of the parties, referring the suit to the same person selected by their agreement. Now, whether we view the case as an arbitration at common law, or a reference under the statute, in either case the decision must be the same; because we hold that the statute is in aid of the common law remedy by arbitration, and in no respect alters its principles. . . . The court will not disturb the award of an arbitrator, or report of a referee, unless the error which is complained of, whether it be of law or fact, appears upon the face of the award. And in the case of a report of the referee our statute does not alter or

interfere with this rule. It declares that the decision may be excepted to, and reviewed in like manner as if tried by the court. The clear meaning of this is that exceptions must be taken to the rulings of the referee during the process of the trial in the same manner they are taken before a court; and then such exceptions must be embodied in the report of the referee, or made a part of his report, by being properly certified by him."

A trial before a referee is to be conducted in the same manner as before a court: *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313; *Goodrich v. Mayor etc. of Marysville*, 5 Cal. 430; *Phelps v. Peabody et al.*, 7 Cal. 50.

A referee has all the powers of a judge in relation to the trial: *Plant v. Fleming et al.*, 20 Cal. 93.

In *Edwards on Referees*, page 114, it is said: "The rules of evidence are the same before referees as before a jury. They come in the place of a jury. Improper testimony must not be heard before them, any more than before a court at the circuit: *Every v. Merwin*, 6 Cow. 364."

And again, at page 115, *Edwards* says: "A husband and wife cannot give evidence for or against each other. . . . As the law of the state of New York now stands, interest in the event of an action will not debar a person from being a witness: Code, sec. 398. And a party to an action or proceeding may be examined as a witness, in his own behalf, the same as any other witness, but such examination shall not be had, nor shall any other person, for whose immediate benefit the same is prosecuted or defended, be so examined unless the adverse party or person in interest is living; nor when the opposite party shall be an assignee, administrator, executor or legal representative of a deceased person": *Id.*, p. 116.

Eyres v. Fennimore, 2 Penn. 932, was a case where the referee admitted the testimony of one of the parties—parties being then incompetent witnesses—and the court set aside the report of the referee on that ground.

Counsel for claimant constantly refers to this proceeding as the "presentation of a claim," and seems determined to divert attention from its real status by ringing the changes upon that phrase.

It must sufficiently appear from what has been said that that condition of the matter had practically ceased when the administrator had in effect rejected the claim, and with the consent of the claimant agreed that it became a litigated matter, and be referred to a referee for trial. The counsel asserts that it is an "utter absurdity that the presentation of a claim is either an action or proceeding." But the learned counsel has not undertaken the task of defining what it is, if not an action or proceeding. It is a remedy—a something—that is provided for in the Code of Civil Procedure, and that statute says that every remedy is either an action or a special proceeding. And the supreme court of California has in rather terse language given us this decision which may be of some applicability here: "The presentation of the claim to the administrator is the commencement of a suit upon it": *Beckett v. Selover*, 7 Cal. 241, 68 Am. Dec. 237.

But there is one thing in which the counsel and the court agree. It is this: "The law not only empowers but requires the executor or administrator to either allow or reject the claim." Following this up, he should have added that in this case the administrator did not allow the claim because he did not so indorse it, but that the administrator did in effect reject the claim because he did not allow it, and because that is made by statute presumptive evidence of rejection, and because he entered into an agreement with the claimant that there should be a trial had before a referee of the question as to whether or not any claim existed in favor of David Mannheim against said administrator.

Counsel enters into the discussion of a number of questions which have no bearing upon this case. So far as the determination of the present motions is concerned, it makes no difference whether the claimant would have the right to bring a suit in the ordinary method upon his claim within ninety days after the confirmation of the referee's report or not. It is immaterial in this matter whether the rejection of a claim by an administrator is a judgment or not, or whether his allowance of a claim is a judgment or not.

There can be no doubt, however, that where parties have by agreement submitted a controversy to a referee for trial, as

in this case, that the judgment of the court entered upon the report of the referee is a judgment in fact as well as in name, for the statute expressly so declares.

" . . . And the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process": Code Civ. Proc., sec. 1508.

A judgment against an administrator is of no greater dignity than an allowed claim. The code plainly places them upon the same footing: Code Civ. Proc., secs. 1497, 1504.

Now, ought not this to be decisive of this controversy? Section 1508 provides for the entry of a judgment upon the report of a referee, and further provides that such judgment "shall be as valid and effectual in all respects as if the same had been rendered in a suit commenced by ordinary process." What is a judgment? The same Code of Civil Procedure, in which we find this provision for the entry of a judgment with a statement of its effect, furnishes a definition of what a judgment is, and it may be assumed that it is unnecessary to cite authorities to the point that where a term is defined in a statute the use of that term in the same statute is in the sense of such definition.

Section 577, Code of Civil Procedure, thus defines a judgment:

WHAT IS A JUDGMENT?

"A judgment is a final determination of the rights of the parties in an action or proceeding."

Note the fact that these words "parties" and "an action or proceeding" are the identical words used in subdivision 3 of section 1880, Code of Civil Procedure.

Now, in view of these facts, can the conclusion be avoided that the legislature intended, by providing in section 1508 for the entry of a judgment on the report of a referee, that the proceedings on a reference should be regarded as "an action or proceeding" of the kind referred to in sections 577 and 1880?

Further, there is here, in section 1508, provision for the entry of a judgment. A judgment must be against some one

and in favor of some one—that is, there must be parties. If this reference is not to be regarded as an action or proceeding for the enforcement of a legal remedy, the entry of a judgment upon it—a judgment “as valid and effectual in all respects as if rendered in a suit commenced by ordinary process”—is the entry of a judgment in neither of the only two kinds of judicial remedies provided by the law of our state for the enforcement or protection of a right or the redress or prevention of a wrong (Code Civ. Proc., secs. 20-23), and consequently deprives some person of his property without due process of law. Will this court hold section 1508 to be unconstitutional when its constitutionality with less violence to its language may be upheld?

But, as before remarked, the constitutionality of this section has not been questioned. Can it be questioned, or can it arise in this particular case? Are not all of the parties, by their agreement of arbitration or reference, estopped from questioning the statute under which they have contracted?

A statute which provided for the entry of a judgment against a person without a trial would be in violation of our constitution. The proceedings before the referee must be regarded as the trial, “as in other cases of reference.”

Concerning counsel's criticism upon the following language found in section 1508, Code of Civil Procedure: “The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators,” that this legislature could not have intended that the proceedings upon the claim and reference should be regarded as an “action” because “a thing cannot be compared with itself,” a few words only need be said. It might be argued that the word “other” is to be applied between “in” and “actions” in the clause just quoted, if it were necessary to do so, for forcible reasons can be given for such a reading. In a very strict sense, counsel is probably correct in his assertion that a thing cannot be compared with itself; but it is a rule which is so commonly disregarded, and so many instances of its violation may be

found in statutes, that a failure to adhere to it is in practice given very little weight.

According to our construction of the above-quoted clause, the intention of the legislature was that the proceedings under sections 1507 and 1508 should be regarded as a "proceeding"; and for this reason: Said sections are merely declaratory of the common law, which provided that "executors and administrators have by power of their office the right to submit to arbitration matters regarding the estate under their administration as a result of their power to bring and defend suits": Am. & Eng. Ency. of Law, p. 647, citing 78 N. Y. 38, 34 Am. Rep. 500; 1 Barb. 519; 14 Tex. 677; 2 Conn. 691; 9 Allen (Mass.), 173; 4 Pick. 454; 6 Pick. 269; 16 Ala. 221; 21 Ga. 334; 1 Met. (Ky.) 117; 3 T. B. Mon. 256; 35 Me. 357; 1 Fair. (Me.) 137; 2 Fair. (Me.) 326; 6 Leigh (Va.), 62; 1 Brock. (U. S.) 228.

The Code of Civil Procedure of California has made special provision for arbitrations (sections 1281-1290), and has expressly designated them as "special proceedings." (See the enumeration of special proceedings preceding section 1063, Code of Civil Procedure.)

It ought to be remarked here that there is some difference between the proceedings of a referee or arbitrator whose authority proceeds solely from the consent of the parties, and one whose authority comes from a judicial appointment. In the case of the former greater latitude is indulged with respect to the strict legal rules of procedure and of evidence.

"Where an arbitrator is to be regarded as an officer of the court, and the arbitration is to be conducted upon legal principles, he will generally not be allowed to admit incompetent evidence": 1 Am. & Eng. Ency. of Law, 680, and cases cited. See, also, Edwards on Referees, 114, 115, before cited.

We believe that it sufficiently appears from what has been already said that this is "an action or proceeding against an administrator," within the meaning of section 1880, Code of Civil Procedure.

In addition to what has been said above, it may be proper to remark that, "in the construction of a statute, the intention of the legislature" should be sought for and must govern: Code Civ. Proc., sec. 1859. Nor is section 1880 to be given that strict construction asked for it by counsel. "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice": Code Civ. Proc., sec. 4. Were it otherwise, we incline to the opinion that the application of counsel's request would operate rather to his prejudice than to his advantage. It is not so long ago that parties were incompetent as witnesses.

The enlarging provision of section 1879, Code of Civil Procedure: "All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses," is itself in derogation of the common law, and the exceptions and saving clauses of the following sections would be so construed as to embrace all who could be reasonably brought within them. The exception provided for in subdivision 3 of section 1880 is an express, though partial, saving of the old common-law rule making parties incompetent as witnesses.

THE "SPIRIT AND REASON"

Of this subdivision, and the intention of the legislature in enacting it, are plain and free from doubt. The object of the law and the intention of the legislature were unquestionably to protect heirs and the estates of deceased persons against precisely such proceedings as were attempted in this reference. This seems so apparent that we deem it unnecessary to enlarge upon it. If this be true, would the court be justified in placing so strict and strained a construction upon the language used as would practically deprive heirs of the

protection intended to be given them by this law? Consider the

"EFFECTS AND CONSEQUENCE"

Of such an interpretation, especially under our probate law, where the public administrator, having no special interest in preserving estates, is given so great a preference in the right of administration. Suppose the case of an administrator colluding with a claimant (and this is entirely hypothetical, and without the least intention of intimating such a condition of affairs in this case), whose claim he knows to be fraudulent, to refer the claim to a referee, and upon such reference the administrator makes little, or, in fact, no opposition to its allowance, and the referee makes a report allowing the claim, and the court, in the absence of any objection of the administrator, confirms the report, what redress has the heir? His right to contest the claim on the settlement of the administrator's account, or any other recourse he may have against the administrator, is practically no protection in the greater number of cases, because there is no one living to contradict the claimant.

For the foregoing reasons the report of the referee should be and it is confirmed.

The General Rule that a Party cannot Testify, where the adverse party is an executor or administrator, to facts which occurred with the decedent before his death, is being departed from by the better authorities as calculated to defeat justice rather than to promote it: *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930; *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 116 Am. St. Rep. 741, 79 N. E. 478. It is settled that subdivision 3 of the Code of Civil Procedure of California applies only to actions upon such claims or demands against the decedent as might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which a money judgment could be rendered: *Wadleigh v. Phelps* (Cal.), 87 Pac. 93; *Ballinger v. Wright*, 143 Cal. 292, 76 Pac. 1108. See, also, *Collins v. McKay*, 36 Mont. 123, 122 Am. St. Rep. 324, 92 Pac. 295.

ESTATE OF ALEXANDER DUNSMUIR, DECEASED.

[No. 23,158; decided March 27, 1905.]

Foreign Probate.—Where a Testator was Domiciled in this State at the time of his death, the courts of the forum of the domicile have no authority to admit his will to probate in this jurisdiction, upon the mere production of a duly authenticated copy of the will and the record of its admission to probate in a foreign country or sister state.

Foreign Probate.—An Order Admitting a Will to Probate in this Jurisdiction, upon production of a duly authenticated record containing a copy of the will and proving its admission to probate in a foreign country, is, where it affirmatively appears from the record that the testator was a resident of San Francisco at his death, beyond the jurisdiction of the court; and it will, on motion, be set aside as void upon its face.

Probate of Will.—A Will must, in the First Instance, be Probated in the forum of the domicile, that being the principal, primary and original place of administration. The law of the domicile governs the admission of wills to probate.

Probate of Will.—Statutory Residence, in this State, Constitutes Domicile.—Under the provisions of the code, the words "residence" and "domicile" are used synonymously and interchangeably; and a finding that the testator was a resident of San Francisco at the time of his death is, in effect, a finding that he was domiciled there.

Foreign Probate.—Domestic Wills.—Sections 1322-1324 of the Code of Civil Procedure, authorizing the admission to probate of a will upon production of an authenticated copy of the will and the record of its admission to probate elsewhere, have no application to the case of domestic wills, but apply only to foreign wills; that is, those made in other states or countries by persons domiciled outside this state. The heading of the article of the code in which sections 1322-1324 are contained is to be taken in connection with the sections themselves for the purposes of construction.

Probate of Will.—Compliance with Statutes.—The admission of wills to probate, whether of residents or nonresidents, being a statutory matter, the court must be controlled in that regard by the provisions of the code, and it ordinarily cannot be governed by arguments of convenience or inconvenience or of hardship. Nor can it amplify its jurisdiction nor arrogate any power beyond that expressly given by the statute.

Probate of Will.—Setting Aside on Motion.—An order admitting a will to probate, void upon its face, may be set aside at any time upon motion in the probate court, there being no limitation upon the

time within which such motion may be made and entertained, and it being unnecessary to resort to a bill in equity for the purpose.

Probate of Will—Filing Certificate of Proof.—While it has been the almost uniform practice here from early times to file a certificate of the proof of the will and of the facts found, signed by the judge and attested by the seal of the court and attached to the will, together with the transcript of the testimony of the witnesses, such procedure is not strictly required except in contested cases.

Motion to set aside judgment admitting will to probate.

Edward P. Coyne, A. Heynemann, Campbell, Metson & Campbell, E. V. Dodwell, and Charles H. Tupper, for the motion.

Charles S. Wheeler, Andrew Thorne, and A. P. Luxton, contra.

COFFEY, J. This is a motion to vacate, set aside and declare null and void a judgment of this court entered May 9, 1900, admitting the will of Alexander Dunsmuir, deceased, to probate, and appointing James Dunsmuir executor thereof, upon the grounds (1) that at the time of making and signing said judgment the court did not have jurisdiction of the subject matter of said estate nor any jurisdiction to do any act in the premises, and (2) that at the time of making said order and signing said judgment the court did not have nor obtain jurisdiction of any of the persons interested in said estate and was without power to make or enter any order binding upon said estate or upon them.

The motion is based upon the records and papers on file in the matter of the estate and is made on behalf of Edna Wallace Hopper, a daughter and heir at law of Josephine Dunsmuir, deceased, who was the widow of Alexander Dunsmuir, decedent testator.

An affidavit accompanies the motion made by Sir Charles Hibbert Tupper, a practicing barrister and solicitor in British Columbia, Dominion of Canada, learned in the law of that realm, and the occupant at different times of the offices of minister of justice, attorney general, and solicitor general of the dominion. Affiant is counsel for Mrs. Joan Olive Dunsmuir, mother of the decedent and the executor, and as such counsel engaged in an action instituted and now pending in

the supreme court of British Columbia, brought to revoke a certain probate of the will of Alexander Dunsmuir, the decedent, which was obtained on an application by James Dunsmuir, on motion of his counsel, A. P. Luxton, who applied for and obtained probate in what is known in that province as probate in common form. Affiant says that in obtaining probate of a will in common form the application is made, as it was in this case, *ex parte*, and the order admitting said will to probate was granted on the affidavit of James Dunsmuir, without notice to any of the heirs of the deceased, and without notice of any kind, such as by publication or otherwise. Probate in this common form is revocable under the laws of that province at any time and the executor who obtains such probate may be cited to bring in the will and propound it in solemn form. Without obtaining probate in common form, and without being so cited, or if being so cited, an executor may obtain probate of a will in solemn form by citing the heirs of the deceased and parties interested in the estate; in which case the procedure and law require strict proof of the death of the testator, of his capacity, and of the valid execution of the will. In the case of a foreign will, evidence is required that it has been recognized as valid by a court of the foreign country, or that it is valid according to the law of the foreign country in which the testator was domiciled when it was executed. Where all in interest have been cited, probate of a will in solemn form is irrevocable and absolute. Affiant further says that in the action now pending in British Columbia for the revocation of the probate herein, Mr. E. P. Davis, K. C., who is associate counsel in the case with Mr. A. P. Luxton for James Dunsmuir, has contended in argument before the supreme court that the effect of an alleged probate of this will which has been granted in this court in California was and is equivalent to a judgment in rem, and therefore, is binding throughout the world, if the domicile of Alexander Dunsmuir was in this state, and that the proceedings adopted in this court were equivalent to what is known in that province as proof in solemn form, and that the question of the valid execution of the will, or whether the docu-

ment was testamentary, and whether the testator had capacity, could only be raised in the court of his domicile.

Affiant finally says that the practice obtaining in British Columbia in respect to the proof of wills is similar to that of England and that the decisions of the English courts are authoritative and binding on this subject in that province.

The records in this matter, numbered 23,158, superior court, department 10, San Francisco, California, show that on April 26, 1900, James Dunsmuir presented and had filed his petition in which he represented that Alexander Dunsmuir died on or about the thirty-first day of January, 1900, in New York City, being a resident of the city and county of San Francisco, state of California, leaving a last will and testament, dated December 21, 1899, which by a judgment duly given and made on the 24th of February, 1900, by the supreme court of British Columbia (in probate) was duly proved, allowed and admitted to probate, and that such judgment, allowance and admission to probate was never in whole or in part appealed from, revoked, set aside, modified, or in any way affected, and that the same had become absolute; that the court which so admitted the will to probate had jurisdiction in the premises; that the decedent testator left estate within this city and county, which was described, and that it was necessary that the will, by duly authenticated copy, be admitted to probate in this state and in this court, and to have the same force as a will first admitted to probate in this state and that letters testamentary issue thereon. Petitioner produced and filed with his petition for probate a copy of the will with the usual authentication record averring that it appeared upon the face of said record that the will had been proved, allowed, and admitted to probate in a foreign country, to wit, British Columbia, and that it was executed according to the law of that place and of the place in which the same was made, to wit, the state of California. James Dunsmuir, the brother of deceased, was named as sole executor and sole devisee and legatee, and the value of the estate in California was averred to be about \$154,000. The heirs were alleged in the petition to be, Josephine Dunsmuir, his widow, residing at San Leandro, Alameda county, Cali-

fornia; Joan Olive Dunsmuir, his mother, residing at Victoria, British Columbia; and the sole devisee, James Dunsmuir, his brother, the petitioner, residing at said Victoria, who consented to act as executor and prayed for probate as aforesaid. In the will testator describes himself as "I Alexander Dunsmuir of San Francisco California United States of America."

Upon the filing of this petition the court made an order appointing time and place for proving by a copy of the will and the probate thereof, duly authenticated, the last will and testament of Alexander Dunsmuir, and for hearing the application for letters and directing notice to be given by the clerk, which appears to have been done, and on the ninth day of May, 1900, the paper was by an order of the court admitted to probate. In this order or judgment is a recital, among others, that due proof had been made and the court found that the testator was "at the time of his death a resident of the city and county of San Francisco, state of California."

This is the record which is challenged as affording evidence on its face establishing its own invalidity, for it is shown thereby conclusively that the decedent testator was a resident of the state of California at the time of his death; and if the contention of the counsel for this motion be correct, that jurisdiction over the probate of wills is determined primarily by the last domicile of the person deceased and that the court exercising probate jurisdiction in the testator's last domicile has exclusive original authority to pass upon the validity of instruments purporting to constitute his last will, to admit or deny probate of the same, and to grant letters testamentary thereon, and that if foreign letters or authority be needful for facilitating a settlement of the estate, where suit must be brought abroad, or part of the property is there situated, the first requisite is to probate the will and procure letters within the domestic jurisdiction, then the proceedings in the case at bar manifest their own fatal infirmity, for it appears therein and thereon that the testator was domiciled here instead of abroad at the time of his death, and, in such case, there should have been original probate in the domiciliary forum, which

is the principal, primary, original, or chief administration, because the law of the domicile governs the distribution of the personal property, whether to heirs, distributees, or legatees, while that granted in any other country is ancillary or auxiliary. It is true these last descriptive words are not found in our statutes, but the principles are there, with local limitations.

The counsel for executor and opponent, conceding solely for the purpose of argument that the will of one who in his lifetime was domiciled in California can never be admitted to probate in this state upon an authenticated copy of the probate thereof in a sister state or in a foreign jurisdiction, insist, nevertheless, that an inspection of the record here fails to show that decedent was domiciled in California; and these counsel further say that nowhere in the codes is it provided that the petition or the record must affirmatively show the domicile of a decedent; they admit that in the petition for probate and in the order admitting the will to probate and in the authenticated document from British Columbia it is recited that decedent was a resident of this city and county, but they contend that it would not necessarily follow from such recitals that he was domiciled herein, for the words "resident," "residence," and "residing" have various shades of meaning covering the cases from mere sojourners to those permanently inhabiting and legally domiciled in a place. This distinction although ingeniously elaborated by counsel for opponent is not tenable under our statutes applicable to the case at bar. There can be only one residence, in a legal sense, in such a case. It is a fact upon which jurisdiction depends, and in our Political Code, section 52, the word "residence" is used as a synonym for "domicile." In the index to the Political Code we find, "Domicile: see Residence." The primary rule for determining residence is, that place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning. It may be said, that in the state of California, statutory residence is domicile; but, it is insisted by opponent, that it not being essential that the record should show where the decedent was

domiciled, the recital of his residence is not inserted to comply with any law requiring a finding of domicile, and hence is to be given the meaning which would sustain rather than that which would destroy the jurisdiction, for every intendment is in favor of jurisdiction. This might apply, if there were any ambiguity in the expression here, but there is none. It appears from the record, constituting what may be called the "judgment-roll," that the decedent at the time of his death was a sojourner in New York, but a resident of San Francisco. It is nowhere in that record, to which we are restricted, suggested that he had a domicile elsewhere. Is it essential that this record should state the grounds upon which the court acted in admitting the will to probate? Probate proceedings being statutory, the court must derive all its power and jurisdiction from the statute to enter the judgment in the particular matter. The statute (section 1294, Code of Civil Procedure) on the head of jurisdiction of probate court when exercised over estate, says that wills must be proved and letters granted in the county of which the decedent was a resident at the time of his death, in whatever place he may have died. Section 1299 provides as to what person may petition for probate of will; and the petition must show, first, the jurisdictional facts: Section 1300. Now, we have seen from section 1294 that residence is a jurisdictional fact, and that it is equivalent to domicile, and it was found in this case, as appears by the order admitting the will to probate, in so many words, that Alexander Dunsmuir was "at the time of his death a resident of the city and county of San Francisco, state of California." This order or judgment further recited that due proof had been made to the satisfaction of the court and it found the truth of the allegations contained in the petition of James Dunsmuir filed herein on the twenty-sixth day of April, 1900, and of all the matters and things therein set forth. Among the allegations covered by this comprehensive clause was that the residence of the decedent laid in San Francisco.

It is provided in section 1308, Code of Civil Procedure, that if no person appears to contest the probate, the court may admit the will to probate on the testimony of one of the

subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law and that the testator was of sound mind at the time of its execution; and the practice has been in this place, almost from time immemorial, to file a certificate of the proof and the facts found, signed by the judge, and attested by the seal of the court, and attached to the will, together with a transcript of the testimony of the witnesses. This practice, however, though having the authority of antiquity, is not strictly required except in contested cases: Sections 1317, 1318. It should appear upon the face of the record that the formalities prescribed by the code have been in all essentials complied with; it is a requisite that it shall be so shown that the will was executed under some jurisdiction and under some law, either the law of the place where the decedent died, or of the place where the will was propounded, or the law of California; but this record is silent upon that indispensable point and imparts no information which would authorize an inference or indulge a presumption that the requirements of the statute were fulfilled, even if inferences or presumptions were permissible in the premises.

All of these provisions of the codes from section 1294 to 1318, Code of Civil Procedure, both inclusive, relate to what is commonly called "original" probate, or probate of "domestic" wills. While this latter term is not found in the statutes, usage has applied it to these sections as contradistinguished from the documents treated in the succeeding article of the code, comprising sections 1322 to 1324, inclusive. Thus construing and co-ordinating these sections, we have two classes of wills: domestic and foreign. In the second class are included wills made in other states or foreign countries. Page on Wills defines a foreign will, in the sense that the term is used in the law of probate, as a will executed in a state or country by a testator there domiciled, admitted to probate there upon the death of such testator, and subsequently offered for probate in another state. Page says that the statutes for admitting a domestic will to probate, and for the effect of the order of probate, are generally taken as analogies in cases of foreign wills

where applicable. The article of the Code of Civil Procedure of California concerning this latter class is headed: "Probate of Foreign Wills." Section 1323 is entitled: "Proceedings on the Production of a Foreign Will," and section 1324, "Hearing Proofs of Probate of Foreign Will." Our supreme court has decided that these headnotes are parts of the statute limiting and defining the sections to which they refer, and to refuse to give them effect according to their import would be to make the law, not to administer it. If, then, there be a "foreign" will, there must, of necessity, be a "domestic" will; for the effect of the rule laid down by the appellate tribunal is to write into the body of the sections under article 3, title 11, chapter 2 the word "foreign," thus making the context correspond with the headnotes of the sections and the title of the article. Were it not for these provisions, there would be no law in this state authorizing the admission of a testament made in another jurisdiction, and it is clear that the intent of the legislation was to extend by courtesy to citizens of another state and subjects of a foreign country the privileges granted to residents within our own borders, thus by comity enabling nonresidents to share equally with our own people the benefits of our laws. All the rights of either resident or nonresident are derived directly from the statute. This court cannot amplify its jurisdiction, nor arrogate any power beyond that expressly given to it by the statute; even though by such self-denial great hardship, inconvenience or loss might result in any particular case. It may be, as counsel assert, that to hold that our courts have no jurisdiction to admit to probate upon an authenticated copy the will of a person whose domicile was California would invalidate the titles to millions of dollars worth of real property; but if the statute commands, the courts are bound to obey, at whatever hazard to individual fortune. At the same time, the court should be careful to avert such a calamity, unless the mandate of the law is imperative and absolute. As an original question, this court would be bound, under its view of the meaning of the statute, to hold that the primary place of probate was in San Francisco, and that the sections under the title "Pro-

bate of Foreign Wills" have no application to wills executed by citizens domiciled in this state, but only to instruments made according to the laws of some other state or country.

As a general proposition, the will of a citizen of this state can be proved only by producing the original, although in certain circumstances, recited in section 1299, Code of Civil Procedure, our courts will admit to original probate a will which is beyond the jurisdiction of the court. It may be, as is said by counsel for opponents, that the proceedings in such cases are ordinarily costly and cumbrous, and that a far more convenient method is proof by exemplified copy, and that the public convenience would be subserved thereby, and that no hardship would result therefrom, and that all the protective provisions for proponents and contestants exist equally in both modes; but the argument of convenience or inconvenience and of hardship is always a dangerous one, especially in purely statutory matters. The code is the chart and compass of the court. Our courts, as was said in *Sturdivant v. Neill*, 27 Miss. 157, in adjudicating upon wills which depend solely for their validity upon our law must look only to that statute of which they are judicially informed, and not to the laws of another country, which can have no influence either way on the decision of the question. Counsel for opponent, however, insist that not only does the language of the statute cover the case—not only is the public convenience in favor of construing the statute according to its terms, but our supreme court has squarely decided the proposition in *Goldtree v. McAlister*, 86 Cal. 98, 24 Pac. 801. If this be so, it is an end of the controversy; but it is disputed that the exact question involved in this motion was decided in that or in any other case in California. It is a new point in this state as presented here. This is a motion made to set aside a judgment, because it is void upon its face. It is a direct attack upon that judgment. In the *Goldtree* case the issue as to this was incidental and collateral; the point decided was that the judgment, whether erroneous or not, was conclusive as against a collateral attack. This court has given to the opinion and to the records in that case a careful reading and fails to find that it is applicable to this motion. The only

cognate question determined there was that in a collateral proceeding the party could not ask to have the judgment set aside because of the fact that the record did not appear to be properly authenticated. That matter may be best understood by taking the statement of the point from the body of the opinion, on page 101: To the introduction in evidence of the record of the California probate proceedings the defendant objected on the ground that the probate court of San Luis Obispo county never acquired jurisdiction of the subject matter of the probate of the will, because the copies of the will and of the foreign probate thereof were not certified or authenticated as required by our statutes; held, conceding that the authentication of the foreign probate will is a jurisdictional fact, yet it belongs to that class of such facts which the court must find from the evidence and its decision thereon is conclusive as against a collateral attack. There were other points in that case upon which the judgment turned, but this was the only one pertinent to the discussion here, and the ruling thereupon cannot be considered as authoritative and binding on this motion which presents the issue for the first time in a direct manner. So far as this case is concerned, in this state it is a new question, and this court is without the advantage of authority in our reports up to date; but there are numerous decisions in other states which sustain the principle of this motion, and in all, where the circumstances are analogous, it has been declared that the statute relating to probate of foreign wills has no reference to a will executed in the state wherein the testator resided at the time of his death, and that the proper place of probate of such a will is in the domestic forum. In one of these cases, somewhat similar to this, it was said by the court that if we give to such a statute the broad construction contended for, that wills which must be executed according to the solemnities of our laws, may, nevertheless, be proved according to the laws of any other country, we, in effect, adopt the laws of that country in the particular case, and allow them to decide the validity of the instrument. This was never designed by the legislature. The statute was only intended to prescribe a certain and convenient mode of proceeding by per-

sons who, upon principles of national comity, might claim the assistance of our courts, when necessary, to enable them to assert their rights to property, or to enforce their remedies as creditors in this state, under wills which have been executed in another state or country, and properly established as such in the courts of that country. In another case it was said that if, in this class of cases, the legislature had precluded probate courts from inquiring into a fact, upon which their own jurisdiction depends, that when a copy of a will and its probate in a foreign country are presented, no inquiry can be had whether the original probate, and hence the primary administration, ought not to have been taken here, it would fall little short of a renunciation of the duty which the state owes its citizens to protect them in their rights of property, by seeing to it that the estates of persons deceased, whether real or personal, situated within our jurisdiction, be administered according to our laws. Nothing but language quite unequivocal and clear would warrant the conclusion that such was the legislative intent: *Stark v. Parker*, 56 N. H. 481. The statute in New Hampshire is similar to that in California, and in that case it was said that the question of domicile was all important. A comparison of the statutes will show the appositeness of the citation. There are sixteen states, including California, in which the statutes are almost identical, and twenty-four others where they are substantially similar, and a collation of the authorities in *Woerner* (*491-*496) exhibits a uniformity of judicial opinion that the law of the domicile of the decedent is the dominant factor in admitting his will to probate; it must be governed by the statute of the state in which he resided at the time of his death. There is no case cited from California, only section 1324, upon this point. *Goldtree v. McAlister* is alluded to (*Woerner*, *498) to support the proposition that the proceedings may not be impeached collaterally. This case is the main, if not the sole, reliance of the opponent of this motion; but, for the reasons already stated, this court does not regard it as absolute authority. In the *Estate of Richardson*, 120 Cal. 344, 52 Pac. 832, the point was not made or adverted to in the opinion or the record. It is true the court has the right to inquire

into the fact of jurisdiction, whether raised by the parties or counsel, but it does not always exercise that right. At all events, in the Richardson case the only question was, which of two applicants was entitled to letters of administration, and that was the only point decided. In the Matter of Ortiz, 86 Cal. 306, 21 Am. St. Rep. 44, 24 Pac. 1034, the question was not raised. In the case of Rogers v. King, 22 Cal. 71, all that the court decided was, that a judgment admitting a will to probate, made upon a petition stating all the necessary facts, and after the publication of due and legal notice of the application for probate, is conclusive of the validity of the will when called in question in any collateral proceeding or action. The opinion of the court was, that if, as was agreed, the petition stated all the necessary facts, the judgment of the court, the proper precedent steps having been taken, was conclusive as against a collateral attack. It does not meet the issue in the case at bar. The point here presented was not before the court in that case, nor in any other in California, in the form and on the facts of the record herein, on a motion directly assailing the validity of the probate. That at times wills have been admitted, as in the cases cited, without objection, without contest, and by tacit consent, does not authorize the courts, when the question is raised, to disregard the statute, because in some or many instances it has been erroneously interpreted in uncontested practice. If this court has read the cases correctly, the authorities under similar statutes in other states are adverse to the contention of opponent, and by "similar" is not to be understood literal sameness of language or words, but what counsel for opponent in argument describes as "substantially identical" with our own code provisions; there may be a verbal variance here and there, but the substance, the spirit, the thought, the reason, and, generally, in the cases cited herein, the expressions are the same.

This court appreciates the importance of the issues and the magnitude of the interests involved and dependent upon the final decision of this motion, although it may be mooted whether great mischiefs to domestic interests might not be wrought by sustaining the position of opponent, great as are

those he apprehends by the success of his adversary, and with this appreciation much labor has been bestowed upon the inquiry into the law of the case. The court has been reluctant from the first to a favorable view of a proceeding instituted after years of apparent laches and acquiescence in an act so solemn as a formal judgment affecting vast property rights; but where such a judgment or order is void upon its face, it does not appear that in California there is any time limit within which such a motion may be sustained. Our supreme court has decided that a judgment void upon its face may be vacated at any time upon motion, and this seems to be such a case. The suggestion of counsel for opponent that in the case at bar the party aggrieved should have recourse to a bill in equity, as the only appropriate remedy, is not tenable, if this motion be well based, for here where the error was committed it should be corrected; and the complainant should not be remitted to another forum while relief may be had in probate. If these views be correct, the motion should be granted.

In the Case of Dunsmuir v. Coffey, 148 Cal. 137, 82 Pac. 682, the supreme court affirms that, regardless of the distinction which may exist between the probate of domestic and foreign wills, and regardless also of the correct determination of the domicile of the deceased, the order admitting the will to probate in the principal case was in no sense void, and, supposing it to be erroneous, was valid until reversed directly upon appeal, and its validity could not be collaterally attacked. And in *Estate of Dunsmuir*, 149 Cal. 67, 84 Pac. 657, it was held that a motion cannot be entertained to vacate an order admitting a will to probate which is not void upon its face, after the lapse of the time prescribed by section 473 of the Code of Civil Procedure, and an order granting such motion will be reversed upon appeal.

A Court may Grant Original Probate of the Will of a nonresident who dies leaving either personal or real property within its territorial jurisdiction, without the will first having been proved in the courts of his domicile. But it is the duty of a court to refuse probate to an instrument offered as a foreign will, when satisfied from the evidence that the testator was in fact a resident of the state at the time of his death. When the will of a nonresident is admitted to probate on original proceedings for the purpose of administering on his property within the state, the decree therein binds that property here and everywhere that our courts are accorded full faith and credit, but it is not binding as to the will itself in

other jurisdictions where the deceased may have left property, nor is it binding on the courts of his domicile: *Estate of Clark*, 148 Cal. 108, 113 Am. St. Rep. 197, 82 Pac. 760, 1 L. R. A., N. S., 996; *Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962; *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560; *Estate of Clayson*, 26 Wash. 253, 66 Pac. 410.

While a Foreign Will may be subject to contest when application is made to have it proved and recorded in a jurisdiction where the testator left property, still it should be observed that a judgment in a probate proceeding is a judgment in rem—that is, it determines the status of the matter. Therefore, the judgment of a court admitting a will to probate fixes the status of the instrument as a will, and becomes at once conclusive upon the world of all the facts necessary to the establishment of a will, among which are, that at the time the will was executed the testator was of sound and disposing mind, and was not acting under duress, fraud or undue influence. It follows, for example, that a will executed in California by a testator there residing, and subsequently admitted to probate in that state, may not, when afterward admitted to ancillary probate in Montana, where the testator left real and personal property, be contested on the ground that the testator was not of sound mind, or acted under duress, fraud or undue influence, the Montana statutes providing that when such foreign will is admitted to probate in this state, it shall “have the same force and effect as a will first admitted to probate in this state”: *State v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, 85 Pac. 866, 6 L. R. A., N. S., 617. A will is not subject to collateral attack after probate in foreign courts: *Wells v. Neff*, 14 Or. 66, 12 Pac. 84, 88. Where the court of another state has admitted a will to probate, it must be prima facie evidence that it based its adjudication as to domicile on sufficient evidence, and its judgment in that regard cannot be questioned collaterally: *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913.

ESTATE OF SOPHIA CASEY, DECEASED.

[No. 27,630; decided May 21, 1903.]

Testamentary Capacity—Undue Influence.—While the law will not presume the exertion of undue influence from the mere fact of opportunity or a motive for its exercise, nor permit it to be found upon suspicion, yet proof must generally be gathered from the circumstances of the case, for very seldom is a direct act of influence patent, as a person intending to control another's action, especially as to a will, is not apt to proclaim that intent; and among the circumstances from which proof must generally be gathered of undue influence exercised upon a testator are: Whether he had formerly intended a different testamentary disposition; whether he was surrounded by those having an object to accomplish to the exclusion of others; whether he was of such weak mind as to be subject to influence; whether the alleged will is such a one as would probably be urged upon him by those surrounding him; whether the persons who surrounded him were benefited by the alleged will to the exclusion of formerly intended beneficiaries.

Acknowledgment of Will—Failure of Memory of Witnesses.—The failure of the attesting witnesses to the will involved in the present case, they being the nurse and physician attending the alleged testatrix at the time of the execution of the instrument, to recollect whether she acknowledged the paper as her will, is adversely commented on by the court, especially in view of the fact that the instrument purports to have been executed at a recent date and in the presence of impending death.

Testamentary Capacity—Clinical Chart of Nurse as Evidence.—A clinical chart kept by a nurse, showing, by entry made therein by her, that she administered a powerful opiate to her patient a short time before the patient is alleged to have executed a will, is, in conjunction with the testimony of the nurse as what must have been the stupefying effect of the drug, strong evidence of the condition of the mind of the testatrix at the time of the alleged testamentary act.

Testamentary Capacity—Person in Last Sickness.—The testatrix in this case having executed a will on the last day of her life, at the age of nearly eighty years, the court finds, from the combined effect of her sickness, the frequent administration of opiates, the intensity of her pains, and the other influences acting upon her will and understanding that she must have been incapable of voluntary and intelligent disposition at the time.

Testamentary Capacity—Undue Influence.—The court finds from an examination of the evidence in this case that the will dated October 21st was inspired by the proponent, that he was the informing

spirit of that testament, and that it was his will rather than of the nominal testatrix.

Application for probate of wills filed October 21, 1902; September 25, 1902; October 21, 1901. Contests as to each were consolidated at the trial.

C. M. Jennings, for paper of October 21, 1902.

Max Blum, for September 25, 1902.

Pippy and Bahrs, for October 21, 1901.

William Loewy, Loewy and Gutsch, for certain heirs.

COFFEY, J. The first paper propounded was filed on October 27, 1902, by C. M. Jennings, attorney for the proponent, Charles W. Fisher, accompanied by a petition for the probate thereof in which it was alleged that one Sophia Casey, a widow, aged about seventy-nine years died testate on October 22, 1902, in this city and county, whereof she was a resident, leaving estate therein and elsewhere within this jurisdiction, real and personal, exceeding in value \$10,000 disposed of by a will dated October 21, 1902, executed in due form of law; that at the time of the execution thereof the testatrix was of sound and disposing mind and not acting under duress, menace, fraud or undue influence; that she left no kin in this country; that the names, ages and residences respectively of the legatees and devisees named in the will are as follows:

1. The petitioner, Charles W. Fisher, aged forty-three years, residing at 14 Lexington avenue, San Francisco.

2. Sophia Britton, a minor, daughter of William Johnson Britton and Rosa Cecilia Britton, his wife, residing at 7 Dore street, San Francisco.

3. Mr. and Mrs. Arthur J. Pinkstone, of lawful age, residing at 2533 Mission street, San Francisco.

4. Golden Gate Chapter No. 1, Order of Eastern Star (a benevolent corporation), of and residing in San Francisco.

5. Sophia Schmidt, daughter of Caroline Schmidt (nee

Laubschu), a minor, residing at Berkeley, Alameda county, California.

6. German Old Folks Home, known as the "Deutsches Altenheim," in Fruitvale, Alameda county, California, a benevolent corporation.

7. Anna Maria Eissler, widow, of lawful age, residing at No. 10 Sycamore avenue, San Francisco.

8. The descendants of Adam and Jacob Kammerling, "now or formerly of near the town of Nohfelden, Birkenfeld, Grand Duchy of Oldenburg, Germany, names and ages unknown; identity and residence not otherwise known. The Burgomaster of said town of Nohfelden, or his successor in office, in trust, to ascertain the descendants of said Adam and Jacob Kammerling, and to make distribution unto them."

This petition for probate further alleged that the petitioner Charles W. Fisher and one Joseph Friedlander, both of San Francisco, were named in the paper propounded as executors, and that Fisher consented to act as such but Friedlander had not up to date signified his purpose and petitioner prayed for probate and for his own appointment and that of Friedlander, if he should consent to act in that capacity.

On October 28, 1902, Joseph Friedlander, through his attorney, Max Blum, filed his petition alleging that deceased left a will duly executed on September 25, 1902, which was her last will, and in which he and Charles W. Fisher were named as executors, but that Fisher declined to act and this petitioner consented and asked that letters testamentary be issued to him upon the probate of the instrument.

On November 5, 1902, one H. A. Ph. Bohr, through his attorneys, Pippy and Bahrs, proffered for probate an instrument dated October 21, 1901, purporting to have been executed by the said decedent, in which himself and one Arthur J. Pinkstone were named as executors, and at the same time was filed a codicil dated October 31, 1901, both papers executed with the legal formalities. Bohr asked for letters; Pinkstone did not join. The contents of all of these petitions for probate were substantially similar as to fact and form, which may be more apparent from the subjoined tabulated statement of the three testaments:

| 3d Will. | 2d Will. | 1st Will. |
|--|---|----------------------------------|
| Charles W. Fisher \$5,000 | | |
| 155 acres, Fresno | 155 acres, Fresno | 155 acres, Fresno |
| Valley Street lot | Valley St. lot | |
| 4 trunks | Stamps collec- | Stamps collection. |
| Stamps collection | tion. | Certificate "Chosen |
| All personal property | | Friends." |
| in living rooms. | | |
| Sophia Britton \$ 100 | \$ 100 | \$ 100 |
| Mr. & Mrs. Pinkstone 400 | 400 | 400 |
| Golden Gate Chapter | | |
| No. 1, O. E. S. 100 | 100 | 100 |
| Sophia Schmidt 100 | 100 | 100 |
| Deutsches Altenheim 100 | 100 | 100 |
| Maria Eisler 1,000 | 1,000 | 1,000 |
| Descendants of Adam Kam-merling. } One-half of residue. | One-half of residue. | One-half of residue. |
| Descendants of Jacob Kam-merling. } One-half of residue. | One-half of residue. | One-half of residue. |
| Executors: | Executors: | Executors: |
| Chas. W. Fisher. | Joseph Friedlander. | H. A. Ph. Bohr. |
| Joseph Fried-lander. | Chas. W. Fisher. | Arthur J. Pink- stone. |
| Witnesses: | Witnesses: | Witnesses: |
| C. M. Jennings, 214 Pine St. | Joseph Jones, 2121 Mission St. | Diedrich A. Brune, 2036 Mission. |
| Lynette Laemmel, 1810 Pine St. | Mrs. Virginia H. Barker, 14 Lex-ington Ave. | Chas. Rehn, 2030 Mission. |
| C. W. Card, M. D., 502 Devisa- dero St. | | |

On December 1, 1902, acting for himself as the executor of the will of 1901, Bohr filed a contest to the alleged wills of October 21, 1902, and September 25, 1902, in which he alleged as grounds of opposition that each instrument was not duly executed; that at its date testatrix was by reason of her age and infirmities impaired in mind and memory, destitute of testamentary capacity; that she was unduly influenced by Fisher; and that the document did not substantially represent her wishes and that she had no knowledge of its contents.

A similar contest had been filed by the same party, acting as attorney in fact for certain German heirs, on November 24, 1902.

Issues were joined on all the contests and the matters came before the court for hearing on ———, 1902, and by agreement of all the parties and their counsel the various contentions were consolidated.

The important difference in the dispositive provisions of the three wills is the item of \$5,000 additional legacy given to Charles W. Fisher in the third testament.

There is not apparent any sufficient reason why the testatrix should so soon after the execution of the paper of September 25, 1902, a document drafted with care and skill by the same attorney, execute another will except to add to the Fisher bequests.

According to the evidence of Dr. Charles Wesley Card, a subscribing witness to this instrument and her attending physician, she communicated to him this purpose more than ten days prior to the date of the document. Dr. Card testified that he had been the family physician of Sophia Casey for ten years prior to her decease, and that he had attended her in her last illness, from the 29th of September to the 22d of October, 1902, and saw her every day during that period, sometimes two or three times, and was intimately acquainted with her physical and mental condition; it was he suggested the employment of Lynette Laemmel as nurse, who began her attendance on October 8th and continued thereafter until the end: this lady was also a subscribing witness. Dr. Card said that when the will was to be signed testatrix was given the pen and a little book on which the will was placed before her; she was propped up on the bed and asked to sign her name; she took hold of the pen and got her fingers down on the ink, and then said, "I do not feel strong enough to sign this will," and then Mr. Jennings suggested that the doctor write her name "Sophia Casey," leaving a space between her name and allowing her to make her mark there, which was done; she asked the doctor to sign his name, but he could not remember whether she asked him to sign her name; the doctor could not say whether she asked

him to sign her name, or whether he took the paper and the lawyer asked him to do so, but "it was legitimate anyhow." Dr. Card, after making this remark as to the legitimacy of the transaction, continued to testify that he took the paper and wrote her name and then put the paper back on the little book she had there and she made her cross there; but whether she made any observation at that time the doctor could not say; he saw her make her mark, however, and it was done in the presence of Miss Laemmel, the trained nurse, and Mr. Jennings, the lawyer, the latter of whom said in regard to the inability of Mrs. Casey, through her weakness, to write her own name, that that fact changed the will considerably, as it would involve some writing below the signature to explain the circumstance, and thereupon the lawyer took the document and wrote something down which he subsequently read to the witnesses, but the doctor forgot what it was and did not pay any attention to it, but it was something about why she did not write her name. Upon being urgently admonished by the examining counsel, Mr. Jennings, to stop and think again and tell whether or not Mrs. Casey said anything about anyone signing her name to this paper because she did not feel strong enough to sign it, the witness responded that he could not say; that he could not say positively whether she suggested or whether the lawyer suggested that the doctor sign her name. In answer to another urgent appeal from the examiner, the doctor declared that he did not remember that the testatrix said anything to the lawyer, who had come to the house that morning in response to a telephonic request from the doctor; the lawyer arrived at about half-past 10 o'clock; he came in and took the will out of his pocket and read it over to the decedent and then asked her if that was satisfactory, and she said yes, and then she asked for a pen which was given to have her sign the will. At this point in his examination the examiner, Mr. Jennings, adjured the witness to try and think again and answer if Mrs. Casey did not say something to him, the lawyer, when she found that she was unable to sign the will with her own name herself, but the doctor answered that he did not remember what was said at all; the doctor signed her name

at the request of the lawyer, who showed him how to do it; the doctor was ignorant of the formula and the lawyer instructed him saying: "Write Sophia there and Casey there, leaving a space to put her mark between the names"; the doctor did not remember that Mrs. Casey asked him to write her name or that she said anything at all; she took the will in her hand and read it over and then the lawyer read it to her. In answer to the examiner, Mr. Jennings, who inquired at whose request he read the will to Mrs. Casey, the doctor said it was at her request, "because she could not feel like reading it," "did not feel like reading it; she was very weak." In speaking about some trunks, the testatrix corrected what was in the will and said it should be six trunks instead of four; then the lawyer took the paper and sat down and wrote something below—the doctor did not know what it was, but supposed it was a correction with regard to the number of trunks. Certain blots on the paper were made by the testatrix taking hold of the pen she got her fingers down on the pen and fumbled the paper and then the lawyer took the pen out of her hand; she said "I cannot write my name, I am too weak," and then he took the pen out of her hand. Dr. Card further said in response to the question by the examiner, Mr. Jennings, as to what testatrix said, if anything, about this document when she made her mark: "There was nothing said about its being her will and last testament"; he did not know that Mrs. Casey said anything at all; it was understood it was her will and she had it read to her, and she signed it; it was read to her as her will and that was satisfactory and she proceeded to sign her name there by a cross. The doctor then repeated that there was nothing said that it was her last will and testament at all. Mrs. Casey did not ask the doctor to sign the attestation clause, but she had asked him previously to sign the will, but it was Mr. Jennings who asked him to sign that clause; that addition to the will explaining why she could not write she wished the doctor to sign; she was very weak physically, but the doctor did not apprehend the dissolution to take place so soon—he thought she would last two or three weeks longer; her mental condition that morning was good and clear, she was of sound

mind; she knew what she was doing; she had talked with him as to the execution of this will about a week or ten days previous—in fact, from her first illness when the doctor was called in, she talked the matter over with him; she said that she had a will out and she wished to make a change in it; Mrs. Casey made the remark to the doctor that she was in a lawsuit with a family named Bohr, and her only wish was that she should live long enough to come into court and prove to the judge that they had cheated her out of this four or five thousand dollars, and she only wished the doctor would make her live long enough to get that money back; the doctor testified that he did his best to carry her along, but it went along for a number of days and she was getting worse, and he told her that her sickness looked rather dubious and it was possibly the chance she might not live very long and if she had any papers to take care of she had better do it as she might pass off quickly; her heart was weak; she said she was going to make out a will and wanted to leave money to Mr. Fisher, that she did not suppose he had money enough to go on and fight the case with if she died, she wanted to leave him enough for that purpose; she told the doctor she wanted to make out a will, and he notified Mrs. Fisher that she should notify her lawyer, Mr. Jennings, that he was wanted out there to draw up some papers. This conversation occurred about a week or ten days prior to the decease of Mrs. Casey. The doctor said he saw Mr. Jennings there shortly after he made that request to Mrs. Fisher to notify her lawyer. Mr. Jennings then had a conversation with Mrs. Casey in presence of the doctor about changing the will, and the lawyer told her the contents of the will, and asked what was her wish to have done. Mrs. Casey said: "I want to add to that will \$5,000 to be given to Mr. Fisher," and Mr. Jennings asked her whether there was any undue influence brought to bear on her to influence her in any way in changing the will, and she said not.

In answer to a rather suggestive question from the examiner, the witness stated that Mr. Jennings then said to Mrs. Casey that he would prepare the paper at her request and she told the lawyer that of course she was pretty weak and they

would wait awhile, there was no hurry; they did not expect her to die so soon; he said to Mrs. Casey and Mr. Jennings both then and there, "There is no hurry to have this will signed, wait until she gets stronger and she can sign it." and it ran along for a week, and seeing her getting weaker every day and concluding she was not going to recover, the doctor telephoned to the lawyer that he had better come up there and have the will signed, as he did not think she would live very long. This was on Friday, but he could not reach him on that day, so he tried the next day, Saturday, and he was out again. On Sunday the doctor hung up the telephone but on Monday took it down again and caught the lawyer, and an appointment was made for Tuesday at about 10:30 A. M., and at that time the transaction was consummated. For a week prior to that time she was suffering a great deal of pain; she was physically weak and suffering from rheumatism and the doctor had given her opiates to relieve her more or less. The opiates were intended for immediate effect and were given whenever she had pains; they were given for days and days, for a number of days; the instructions to the nurse that when the patient got in violent pain to give her an opiate; the nurse had discretion in this respect; the effect was to induce sleep for from two to four hours; the duration of sleep would depend on the intensity of the pain; if the pain was not severe it would be from six to eight hours, or eight to ten hours; sometimes she got them only once a day; on the morning that this will was executed no opiates were given to her; on the doctor's instruction she was not given any opiates, because he wanted her mind clear, as clear as could be, so she would know what she was doing; for that reason the doctor instructed the nurse not to give the patient any opiates that morning; she was suffering a good deal of pain that morning, but she could talk all right; she had her right mind and conversed and talked as usual, and her voice was about the same as her ordinary tone; at the time the will was executed the doctor understood it was her will but he would not swear whether or not she said so; he took it for granted she was supposed to know without saying so at all; the will was there and it was read to her in his presence and, therefore, he knew

it was a will; she had requested him to be present and sign as a witness, and the paper was signed, or her mark was made, in his presence and in that of Miss Laemmel and Mr. Jennings; but so far as Mrs. Casey making any request at that time of any of the rest of them signing as witnesses, he did not know of her saying anything; the doctor said he did not know the exact words that were used there at all with regard to who should sign it. Upon further questioning by the examining counsel, Mr. Jennings, as to whether or not he knew that Mrs. Casey spoke of the matter at all, the doctor answered that to him she said, "I want you to sign the will," and, "Miss Laemmel, here, the nurse, can sign it also," and of course, the lawyer being present, "will you sign it, also." The doctor did not know that she told him in exact words, but she wanted him to sign that will. The examining counsel undertook to refresh the doctor's memory as to what transpired in the transaction, but was unsuccessful in his endeavor; however, the examiner succeeded in eliciting from the witness an affirmation of his interrogative statement that Mrs. Casey on the morning that she executed this will and while executing it was not acting under the influence of menace or fraud or undue influence of anybody or any misrepresentations. That was the last the doctor saw of her; he forgot whether he saw her the same evening or not; he left about noon and was not there again; after the execution of the will he ordered an opiate given and it was administered; he directed the nurse to give an opiate as frequently as the patient had pain; if she had very much pain to administer an opiate to keep her out of misery. The doctor answered the examiner that he first considered her case critical—that is, that her death might occur within a short time—when he telephoned to the lawyer to come up and have the will attended to; the doctor then began to realize that she was getting serious and if she had any business she should attend to it. This was on the Friday before her death. In answer to a pressing and repeated inquiry from the examiner, the doctor said that he could not remember the occasion of the lawyer's call upon Mrs. Casey a week or ten days prior to her death when a conversation was had between her and the attorney, when she

stated the changes she wanted made in her will and said something about calling to the lawyer's office to execute it; he could not remember anything on that subject at all. Mrs. Casey told the doctor the whole story of her trouble with the Bohr family; she said that she had lent Bohr some money, somewhere between four and five thousand dollars, and when she asked him for a mortgage he refused to give it and said he did not obtain any money from her; she said she was going to take it into court and fight it; she drew the money and gave it to him on the understanding that she was to have security, and when she demanded security Bohr refused to give it to her and she said she was going to recover it if she possibly could; this was the gist of her statement to the doctor, who thought that the dispute between herself and the Bohrs affected her health injuriously, and that it was the means of hastening her death and that it broke her right down physically; it worried her very much; the minute the doctor went into her room the first subject she would touch was the Bohr family and how they beat her out of the money. The doctor testified that he saw Miss Laemmel and Mr. Jennings sign the will as witnesses, at the same time; testatrix was awake and the signers were right near her head; she was conscious of what was going on; she was a woman of strong will power. The doctor had suggested the employment of Miss Laemmel as nurse; she kept a clinical record which he inspected every day and which the doctor had in his possession and produced on the stand at the request of the cross-examiner, Mr. Blum. In response to this cross-examining counsel, the doctor said that this document constituted the entire record that was kept. The opiates ordinarily administered were pulverized opium as a suppository and morphine capsules; the suppositories were compound prescriptions; the doctor would ordinarily interrogate the nurse about the record when he called; champagne was given to the patient during the period of the nurse's attendance; the nurse had the privilege of giving medicine at her discretion; the doctor's instructions were to give an opiate as the patient needed it, when she was in violent pain. On the occasion of his visit last prior to the making of the

will, he told the nurse not to give an opiate in the morning of the 21st, because he expected the attorney there to attend to this matter and they wanted her mind clear. He called later that morning at about 10 o'clock and was there when the lawyer arrived; Mr. Jennings came in at about half-past 10. The matter of the will occupied probably an hour, but he did not gauge the time by his watch. Mr. Jennings left first and the doctor remained a short while afterward and ordered an opiate given to the patient and waited to observe its operation and then departed. If an opiate had been administered that morning prior to his arrival, the doctor testified he would have been able to know it, even if he were not told so. Opiates ordinarily took effect quite promptly on Mrs. Casey, and the dose of morphine that he was in the habit of administering to her would take from two to four hours to wear off, so that if an opiate had been given to her prior to his arrival that morning he would have been able to detect that fact. But it appears from the clinical record, produced on the witness-stand by the doctor on cross-examination, that there had been an opiate given to the patient that very morning at twenty minutes past 10 o'clock by the nurse, Miss Laemmel, who testifies that at that hour she administered to Mrs. Casey a reduced dose of only two-thirds of a capsule, the full dose usually given being one-fourth of a grain; according to this clinical chart the patient had "cried out with pain in right leg" just before this medicine was given. The chart does not indicate the contents of the capsule, but the nurse testified that the ordinary quantity was one-fourth of a grain, and there is nothing in the note of the amount administered at 10:20 A. M. of October 21st, 1902, to show that it was more or less than one capsule of the customary content.

Dr. Henry Harris testified that he made a visit with Joseph Friedlander on the evening of October 21, 1902, to the house of Mrs. Casey, whom he was asked to see by that gentleman; they entered the house together but were not immediately admitted, as the trained nurse in charge of the case made certain objections, saying that the attending physician had left orders that no one should see the patient. After

some demur and parley they were admitted to the apartment of the patient; this was at 8:40 P. M., according to his timepiece; they saw the lady, who was in bed; Dr. Harris fixed the time of his visit from data or what he denominated a "protocol" that he made. The patient was profoundly unconscious—that is to say, she was incapable of being aroused by questions addressed to her in a loud tone; she was not conscious during the ten minutes they were in the room; during this time Dr. Harris had a conversation with the trained nurse in which she informed him that she had kept a clinical record, which she exhibited; on that record or chart, which this witness identified, there was entered an item on the date of Tuesday, 22-x-'02, 10:20, "champagne," then a medical sign meaning two ounces, then the word "cap.," abbreviation for capsule, followed by the figure 1 in parenthesis, thus (1); the nurse volunteered the statement that this capsule contained grains one-fourth of morphine; this witness was positive from his protocol and from his independent recollection that the trained nurse had told him that that particular capsule contained one-quarter of a grain of morphine; as he was looking over the clinical chart she volunteered the information that at 10:20 that morning the patient had received a capsule containing morphia, grains one-quarter, such a record having been there shown. Dr. Harris swore that he knew nothing about the testimony given in the case by the nurse, Miss Laemmel, or the attending physician, Dr. Card.

Miss Laemmel denies that she made any such statement and avers that what she did say to this physician was different. Upon the occasion of his call and after he and Mr. Friedlander had looked at the patient and called to her and Friedlander walked out of the room, Harris remained and turned around and began looking at Mrs. Casey, and the nurse said to him, "you know, doctor, she is under the influence of opiates," but she said nothing about any particular opiate, nor the amount of morphia; it was opium that was administered.

There is here a conflict between Dr. Harris and Miss Laemmel, but wherever the truth lies between them, it is

plain that an opiate was given at that hour, notwithstanding Dr. Card's positive assertion that if such were the case he would have detected it. Whatever the quantity given it is clear the patient was suffering intense pain and it was necessary to alleviate her distress, and it required, as a rule, according to Dr. Card and the nurse, a full dose to accomplish that purpose. What effect did this dose have upon her? Was she after this ministration mentally active as usual? Was her mind in its normal state—that is, was it able to operate according to the principles which govern the intellect in its healthy and natural condition? Was her intelligence intact and her volition dominant? Were her faculties full and her consciousness complete? Confessedly her body was unsound; had she a sound mind when this instrument was executed? Whether the clinical record of the nurse can be relied upon or not, whether at 10:20 A. M. on October 21, 1902, one quarter of a grain of morphia was given to the testatrix, which would have put her into a stupor at 10:30 A. M. when the instrument was executed, or whether a reduced quantity of the anodyne was administered, she had been suffering excruciating bodily pain to relieve which the drug was given. The doctor had directed the nurse to omit the potion on that morning, so that the patient's mind might be clear, but it seems Miss Laemmel deemed it necessary in her discretion to depart from this direction on account of the agony which her charge was suffering. According to the evidence of Dr. Card, a full dose was essential for repose and its effect would be immediate, lasting from two to four hours; inferentially, a reduced quantity would have its proportionate effect.

What does the nurse say as to the facts and circumstances of this case and her relation to the subject matter? Miss Laemmel seems to be an educated and intelligent woman, whose calling compels closeness of observation of the occurrences of the sickroom and strictness of attention as to the condition and conduct of the patient. She testified that Dr. Card had instructed her on the day before the will was made to give no opiates to Mrs. Casey until the document should be signed, because he wanted her mind clear; the

doctor told her the lawyer was to come the next morning; the nurse was there when he came, at that time the mind of the patient was good and clear; it was between 10 and 11 o'clock when the attorney arrived; he read the will to Mrs. Casey and asked her to listen, and then there was a mistake in the will about some trunks and she corrected that and it was changed; she was lying on the couch and the lawyer was sitting beside her when he was reading; after the correction was made she wanted to be propped up to sign the will and the nurse placed her in that posture; she asked for her pillows and then she took the pen in her hand and she had the book under the will and the lawyer held the book; she made two blots on the paper and she said she could not hold the pen; said she was weak, "or something to that effect," "she intimated she could not sign," and asked the attorney to do it; he did not want to do it and did not do it; the nurse could not remember whether the lawyer said anything to Mrs. Casey as to who could do it or who ought to do it, but finally Dr. Card signed it. After successive entreaties from the examiner to the witness to try and remember about this matter, the nurse having said at first that she thought that the lawyer told Mrs. Casey that Dr. Card could sign it for her, but she did not remember the particulars of that incident; she at length answered in response to the specific inquiry: "Well, try and remember about that. Do you remember that I told her that Dr. Card could sign it for her? Yes, sir, very positive," and then the doctor signed the name "Sophia Casey."

In answer to a question which suggested that at this time the doctor was standing right by the bedside of Mrs. Casey and the lawyer standing by her, the witness said no, she thought he wrote standing up in front of a table by the window; the lawyer told the doctor where to put the patient's name and to leave the space for a cross, and then it was handed back to her and she made the cross with a pen; she was still on the couch; the witness could not remember that Mrs. Casey said anything at the time and did not remember how long it took to read the will to her; the nurse was standing in front of the lawyer and the doctor was beside her;

after the patient made her mark the lawyer took the paper to the table and wrote something to signify that she could not write her name, and after he did that he read it and then they signed their names.

Miss Laemmel was of opinion that Mrs. Casey was of sound mind at that time, as at all times when she was not under the influence of a full dose; there was no set time for the administration of the opiates—they were given when necessary; the nurse gave about two-thirds of a capsule on the morning of the 21st at 10:20, a third less than the customary capsule; despite the doctor's direction to the contrary she gave this opiate because the patient was in great pain and cried out for relief; she was in pain before and after this opiate; it did not stupefy her or put her to sleep at all; it did not cloud or affect her mind; the opiate was lessened in quantity purposely so as not to induce a state of stupor; she was in pain all that morning and made outcries signifying her suffering; the witness could not remember the exact words addressed to the patient by the attorney; it was something about her last will and testament or that kind of legal talk, and testatrix said "yes," as near as the nurse could remember, "she intimated yes"; what the patient answered the nurse could not remember, but she knew that the testatrix "was satisfied with everything that went on that morning all the way through"; after the execution of the will another opiate was given, opium or morphine, a full capsule, under direction of Dr. Card who was present; Mr. Jennings had gone away; this was at 11:30 A. M.; it took longer than usual to take effect because she was in severe pain; more than one was given before any effect could be had upon her, she took still another later. The date in the clinical record "22" should be "21"; the true date should be the 21st; it was Tuesday, 21st October, 1902; the nurse had not slept much at night and had the dates mixed on that account; at 2 in the afternoon one suppository was administered and the witness remembered giving the patient an opiate in the evening at about 7 o'clock; it was about half-past 8 or 9 when Mr. Friedlander and Dr. Harris called; Mrs. Casey was then sleeping as a consequence of taking the opiates; after some ob-

jection on her part she admitted them; after they had looked at her, Friedlander spoke to her, and attempts were made to arouse her without avail. Dr. Harris asked some questions, felt her pulse, examined the clinical record, made some memoranda. Mr. Friedlander said he would return sometime when she would not be under the influence of an opiate, but of course no set time could be given in such a case, "because there is no set time for pain"; no one else was present during this conversation than the two visitors and herself and the sleeping patient; Mr. Fisher was out in the hall.

After the departure of these callers, the patient took nourishment up until 12 o'clock and she seemed just about as usual; from midnight a change took place, and at 3:15 in the morning of the 22d she died.

Miss Laemmel told Dr. Card that she had given the patient an opiate that morning; she so informed him immediately upon his arrival; she remembered very distinctly that she apprised the doctor of that fact so soon as he came in on the morning of October 21st, 1902.

The witness described the gentleman who came in with Mr. Friedlander as "the little doctor," because he was diminutive in stature as compared with the other, who was such a large man; she learned that his name was Dr. Henry Harris. At the time they came in the patient was sleeping from the effects of the opiates, "she was under the influence of an opiate; she was doped"; the witness in answer to a question repeated the expression "doped." "Question: Who doped her? Answer: I did"; she had a full dose—that is to say, of opium or morphine; she had a whole capsule given in the evening, consequently she was asleep from its influence.

During the intervals of Miss Laemmel's absence from her duties as nurse, Mr. Fisher attended to the patient; when she went to her meals which occupied about one hour three times each day he was alone with Mrs. Casey; at least three hours every day; the patient slept a great deal; he never made any special note of her being unconscious; he conversed with her frequently about many things; she would talk about the Bohr case, and about going to Vallejo or Napa Springs or some other place; Fisher never broached the Bohr business

to Mrs. Casey unless she began to talk on that topic, he never alluded to it; he had told her the litigation was getting on all right; sometime along in October he first learned from her that she intended to make a will and leave him \$5,000 to fight the case, but he did not tell her that the amount was excessive for that purpose; she had also stated that when she was done with her property she intended to leave it to him, for he had been like a son to her and had taken care of her business and herself and she intended to remember it.

Some of the items on the clinical records are in Fisher's handwriting, and he was in almost constant attendance, always at call, in and out of the sick room noting different things that she would need, waiting on her when necessary, and ministering to her need in the absence of the trained nurse.

Fisher testified that she had made more than one will in which he was the recipient of a legacy of \$10,000; but nothing more than his bare statement is in evidence on this point. In view of the estimated value of the estate, such a provision for him would have been equivalent to excluding her relatives from any participation in her property, and nothing is clearer throughout than her intention to provide for them. All the wills in evidence, and the fragment of a will in which her kin and their places of residence are enumerated in detail, which were made prior to her last sickness carry out consistently her intention as to her relatives.

As to the provision for Fisher, it seems to have been generous in all the wills, more than he had any real claim to, and the assertion that he occupied a filial relation to the decedent, a sort of adopted son, is not borne out by the evidence. Mrs. Pinkstone's testimony is that Mrs. Casey never referred to him as her son; he was simply her agent and the receipts given by him to her seem to show that he was paid for his services; she was under no natural or other obligation to provide for him; but he evidently had acquired influence over her which he was in a position to exercise testamentarily.

From the 29th of September, 1902, until her death Fisher was with her day and night; he had the opportunity of unduly influencing her, and while the law will not presume the ex-

ertion of undue influence from the mere fact of opportunity or a motive for its exercise, nor permit it to be found upon suspicion, yet the proof must generally be gathered from the circumstances of the case, for very seldom is a direct act of influence patent, as a person intending to control another's action, especially as to a will, is not apt to proclaim that intent; and among the circumstances from which proof must generally be gathered of undue influence exercised upon a testator are: (a) Whether he had formerly intended a different testamentary disposition; (b) whether he was surrounded by those having an object to accomplish to the exclusion of others; (c) whether he was of such weak mind as to be subject to influence; (d) whether the alleged will is such a one as would probably be urged upon him by those surrounding him; (e) whether the persons who surrounded him were benefited by the alleged will to the exclusion of formerly intended beneficiaries.

That the mind of the decedent was intent upon her German kin is shown by her persistent purpose throughout the series of wills in providing for them up to the last document in which Fisher is more favored. The circumstances conspire to the conclusion that he was always using influence in one way or other, above the usual persuasion of a friend, to divert her own design to provide for her relatives; that such was his object and scheme may be seen from numerous items in evidence. The testimony of Mrs. Adelseck, her son and Mrs. Eissler tend to establish this issue, and the incidents at Redwood and Sunol show his willingness and endeavor to influence her last disposition, at a time when by reason of her age and ailments she had lost her will power; and the suspicion of the lawyer himself, the draftsman of the will, is significant and suggestive when he asked decedent if anybody had used undue influence over her—an unusual question for an attorney to ask of a person in her situation.

Mr. Jennings, the attorney for proponent, who had sole charge of the case for the will of October 21, 1902, offered himself as a witness in that behalf, and gave a long and circumstantial account of his connection with the matter from the start. His acquaintance with the decedent began on the

tenth day of September, 1902; subsequently he prepared several wills for her at her request—four at least, perhaps five, two of which she executed, in his presence. He was called to her house by her on the 19th of September, 1902, and in response to that call and before the 25th of September, he drew three wills for her which were submitted to her in the interim; the third or fourth, he was not positive which, she executed on the 25th of September, being the same instrument that is offered here for probate by Mr. Friedlander, one of the executors named therein. On the 10th of October Mr. Jennings visited Mrs. Casey in response to her request; he was not sure whether it was a telephonic message or whether Mr. Fisher personally came to him, but the statement was that she wanted to make some changes in her will; the document executed on the 25th of September had been deposited with Mr. Friedlander at her request and was thereafter continuously in the custody of that gentleman, upon whom Mr. Jennings called and told him that he had been summoned by Mrs. Casey to make some change in her will and asked him if he would intrust him with the paper for that purpose. Mr. Friedlander said he did not feel like giving it without a written order, but Mr. Jennings had no such order. On the morning of the 10th, however, the lawyer called on her and found her lying on the couch; she greeted him as he entered and bowed and smiled; he sat down by her side, took a pamphlet out of his pocket and in response to her statements concerning the will made certain memoranda; in pursuance of the instructions received from her on that occasion he prepared another will for her entirely not having the one previously executed in his possession. Mr. Friedlander still retained that document, refusing to yield it without a written order from the testatrix, and the lawyer had no written order nor authority of any kind from Mrs. Casey to obtain that instrument, so he had to do without it. After preparing an entirely new will for her, Mrs. Casey said to the attorney that she would send for him when she was ready to execute it, or she would go down to his office for that purpose.

On the 20th of October, 1902, Mr. Jennings received a telephonic communication from Dr. Card, asking him to go out as Mrs. Casey desired to execute her will and to bring the document with him for that purpose; he fixed 10:30 next morning himself as the time for calling, and he arrived there about that time; he entered the room; the first person he greeted was Mrs. Casey who was looking toward him as he walked in; she smiled recognition and as he approached held out her hand, and he sat beside her, having said "Good morning; how are you?" Mrs. Casey asked him if he had brought the will, and he replied that he had and took it out of his pocket and handed it to her; she held it in her hand a second or so, then opened it, and looked at it; she turned over each sheet and then asked him to read it; he called Dr. Card and Miss Laemmel, who were both in the room, to come and be witnesses to his reading; they came, he read the will to Mrs. Casey; read each word to her carefully; when he reached the portion bequeathing Mr. Fisher \$5,000, he read that to her with a slow emphasis and he stopped and read it to her again, and then remarked to her, "I think, Mrs. Casey, that is the only change made in the will, the only change in the verbiage of the will, perhaps"; she bowed assent to that; he continued reading the same clause and got down to the point where it said "four trunks"; she stopped him almost immediately after the word "four—four trunks," and she said "six trunks"; he said to her that he would change that right then and he made the change then and there; she said "six trunks and the furniture here," and he altered accordingly; he then read it over to her and she said, "That is right"; he then continued reading the will and when he finished, she said: "That is all right"; he asked two or three times; she did use the word "satisfied," "that is all right now," "I am satisfied"; he asked her if she wished to sign it and she replied, "Yes, I want a pen"; the pen and ink were handed to her; the will was placed on a book in front of her, she in the meantime requested to be propped up and the nurse did so, and Mrs. Casey took the pen in her own hand and put it down upon the paper; her hand trembled quite a great deal; she made a blot or two, then remarked that she was too

weak to write; she then asked the attorney, "Cannot you write it for me?" He said he could if she would direct him, but he would rather not, that there was her lifelong friend, the doctor, to ask him; she said to the lawyer, "Can the doctor sign my name?" And was answered that he could if she would direct him to do so; she then directed the doctor, who has forgotten that fact in his testimony; Dr. Card was within three feet of her; Mr. Jennings said to him, "She wants you to sign her name, Doctor," who asked if he could do it legally, and he was informed that he could, she directing it to be done; the doctor asked the lawyer where and how, and he was shown; he did so standing up, then the paper was returned to the testatrix and the attorney asked her if she could make her mark, she said she could; the will was placed upon a book before her; she took the pen again in her hand, the lawyer being very close to her and she was leaning slightly behind him. Mr. Jennings then said, according to his testimony, "Now, do you declare this to be your last will and testament?" She said, "I do"; he then said, "I want you to repeat the words yourself," and she repeated, "I declare this to be my last will and testament"; he then asked, "Do you want the doctor and this lady to sign the will as witnesses?" And she replied, "I want you all to sign it"; the attorney then said to the doctor and to Miss Laemmel, "She wants us all to sign it; will you sign it as witnesses?" Each signified acquiescence and signed. Mr. Jennings mentioned, when Mrs. Casey said that she could not write her name, that he would have to make an addition to the attestation clause covering the fact that she herself did not sign her name but made her mark, and after that he went to a table in the bay window and wrote the addendum; then they all subjoined their names as witnesses. The attorney had taken the will to Mrs. Casey ready to be executed under the supposition that she would be able to write her own name, and the attestation clause was prepared upon that assumption. Testatrix spoke in a low tone of voice, she did not speak very loudly, yet, notwithstanding that Mr. Jennings has himself an infirmity of hearing, he testifies that he could hear her quite distinctly, since he was seated close to her. After the

execution of the will, testatrix told him to take it down to Mr. Friedlander, and after a few minutes delay he departed and proceeded to the Anglo-California Bank, where that gentleman was engaged, and related to him what Mrs. Casey had done, and said that he had her last will executed that morning, which she directed him to deposit with Mr. Friedlander; that gentleman hesitated, saying that he had been informed she was very ill; the lawyer said she was, and coupled the condition of depositing the will with Mr. Friedlander that he should give a receipt for it, which he declined to do. The attorney said that he would have to retain possession of the document unless he could secure a receipt for it showing what he had done with it, whereupon Mr. Friedlander asked if the lawyer had any objection to leaving the will until some time in the afternoon, when in the meantime he should consult his attorney, there was no objection to this course, and the instrument was left without any receipt; subsequently on the same afternoon, at about 3 or 4 o'clock, the lawyer again waited on Mr. Friedlander to obtain his final decision about the receipt which he still refused to give, so the attorney declined to leave it with him, and taking it back placed it in his own safe deposit box, where it remained until it was produced and filed in court. During all the period of his acquaintance with her, Mr. Jennings testified that testatrix was of sound mind.

The attending physician and the nurse testify that the mind of the testatrix was always clear, and yet neither of them could say even approximately how much of the time she was awake or in stupor. The physician could not testify whether on any day between the 10th and 20th of October he found her awake or asleep. His final reason for knowing that she heard and understood the entire instrument, the reading of which, as he testified, was continuous, without stops, was that she had her eyes open; but, so far as these witnesses are to be depended upon, the proof is far from satisfactory as to the mental condition of the testatrix.

Here was a woman almost four score years of age exhausted in body, distracted in mind by her disease, suffering untold agony, relieved only by the administering of power-

ful opiates, which, as a rule, induced immediate stupor, subjected to the strain of circumstances necessarily attendant upon so solemn a transaction, with a brain enfeebled by age and debilitated by drugs, and yet it is asserted that she was of sound mind and fully competent to make her will, and the subscribing witnesses are relied upon to establish that fact. The execution of a will at so recent a date by a woman on the last day of her life, during the last hour of her alleged consciousness, is an experience which even those who are frequently called upon to attest wills are not apt to forget; so much more should the incidents of such an event fasten themselves upon the memory of persons who for the first time act as attesting witnesses.

It was the duty of these witnesses, by reason of their vocation, to be vigilant and attentive to details. According to the testimony of each, the testatrix was not expected to survive long, she might die at any time; the doctor had been striving to call up the lawyer several days previously because of his apprehension of the nearness of the event, and now when the attorney was in attendance in the exercise of his calling, when their attention was urgently directed to all the minutiae of the execution of the will, it was of the utmost importance that their own consciousness should be clear and their memory active as to what occurred. But their recollection could not be aroused into activity, even under the pressure of leading questions which certainly should have awakened the most dormant faculty.

Mr. Jennings' own admitted infirmity of hearing must have necessitated a more than ordinary loudness of tone from the feeble old lady on her deathbed, and that circumstance of itself should have impressed indelibly the minds of such intelligent witnesses and participants in the ceremony; but they cannot recall the facts as narrated by him.

It seems scarcely possible that, in these circumstances, the instruction given by him to the testatrix as to the manner of acknowledging the execution of the will and her repeating in an audible voice, "I declare this to be my last will and testament," should have been utterly forgotten by the attending physician and the trained nurse, knowing, as

they did, that they were to attest the last will of that dying woman.

Dr. Card testified that there was nothing said about its being her will and last testament; he did not know that the decedent said anything at all, and he repeated in his testimony, as hereinabove narrated, that there was nothing said that it was her last will and testament at all; he took it for granted she was supposed to know without saying so at all. The nurse, Miss Laemmel, testified in answer to the question that the patient "intimated yes," but she could not remember more definitely or distinctly. The attestation clause sheds no light upon the situation, for the doctor testified that when it was read to them by the lawyer, he paid no attention to it and the nurse was about equally inattentive. Neither sustains the attorney as to what occurred as to the essentials of execution. If he admonished them, as he testifies, and if the declaration of decedent was really made in the formal manner related by him, and the words ascribed to her were spoken by Mrs. Casey, it is passing strange that they being present and close to her side, with their attention specially challenged to the occurrence, cannot remember the substance, even if they forgot the tenor; but they unite in the statement that she said nothing on the subject and made no request of them to sign as witnesses or declaration as to the character of the instrument. If the declaration and remarks imputed to her were made, the witnesses either could not have been present or they must have heard them. If they were present and did not hear, because they paid no attention to the act, the execution was defective. It is not merely a matter of entire lack of memory. The existence of the essential facts of the execution and acknowledgment is not to be deduced at all from their want of recollection: the effect of their evidence is, that what the attorney testified to regarding the declaration of decedent did not take place at all or did not occur in their physical or mental presence; they were absent either in body or in mind. The testimony of the doctor admits of no other explanation; and the statements of the nurse are scarcely less conclusive. The failure of memory or the indifference or the want of attention of the doctor

and the nurse as to facts of such paramount consequence, which it was their duty to note with care, and concerning which they are said to have been cautioned, necessarily impairs the value of their testimony as to the condition of mind of the decedent at the time of the transaction; but even if there had been in form an acknowledgment of the will by decedent, its valid execution cannot be determined alone by what was said or what may have been said by her at that time; it can be determined only by considering what was the condition of her mind at the time.

What was that condition? The clinical chart contains matter of significance that cannot be gainsaid; if its insertions are to be taken as true, then at the time the will of October 21, 1902, is alleged to have been executed the decedent could have had no volition and no power of reasoning whatever; she must have been, in the phrase of the witness, Mrs. Eissler, "too dead" to do or say anything, much less indulge in the formal dictation of a testamentary declaration.

The clinical record is pregnant proof to this point, and notwithstanding the testimony of the nurse, in her endeavor to falsify her own entry as to the amount of morphia administered by her at 10:20 on the morning of that day, the intrinsic probability of the chart conveys conviction to the mind. Her testimony, however, is materially affected by the evidence of Dr. Harris as to the statement she made to him on the evening of that day when he, in company with Mr. Friedlander, visited Mrs. Casey and found her profoundly unconscious and irresponsive to every attempt to arouse her. The nurse used one word that expressed her own judgment of the condition of the decedent at that time; she said Mrs. Casey was "doped" by her; and the chart demonstrates that the extraordinary amount of morphia and champagne given to the patient on that day was because she was so agonized by pain as to necessitate narcotization. Even if the dose given to her at 10:20 o'clock on that morning was a reduced one, she was still at the time of the alleged execution of the will in a highly narcotized condition; she could not have had that clear mind to secure which Dr. Card prohibited the prescription, which prohibition the nurse felt constrained to dis-

obey because of the patient's outcries, symptomatic of intolerable anguish. Now, if her bodily torture was diminished by the opiate, her mental power must have been lessened, because the effect of the drug was to allay pain by abating sensibility. The purpose of the prescription was to dull the sense of torment, and so far as it was efficacious it clouded her mind. If it did not perform that office, it was useless to administer it; and when the doctor forbade the nurse to give any opiate to the patient, because he wanted her mind to be clear that morning, he conceded that its effect would be to darken, if not temporarily to destroy, the understanding of the decedent. His own testimony shows his idea, when he positively declared that no opiate had been administered that morning, for if it had, he could have detected it, in face of the fact that the nurse admitted and the chart showed the contrary.

Whether a full dose, an entire capsule, or only two-thirds thereof, was administered to decedent at the hour of 10:20 o'clock on that morning, she was not in a state of mind calculated to capacitate her for so grave an affair. She was either in a stupor from a full dose or partially stupefied and distraught with pain so far as she was sensible of her condition, and in either case she could not have had a sound and disposing mind at the time of the event in issue. From the combined effect of her sickness, the frequent administration of opiates, the intensity of her pains, and the other influences acting upon her will and understanding, she must have been at that time incapable of voluntary and intelligent disposition. It is deducible by fair inference from the circumstances already adverted to, that the document dated October 21, 1902, was inspired by the proponent; that his was the active agency in its creation; his was the dominant influence that inspired its construction. A careful examination of the evidence will justify a finding that Fisher was the informing spirit of this testament and that it was his will, rather than that of the nominal testatrix. In the view taken by the court, the feud between Fisher and the Bohrs is not interesting nor relevant, except as it emits some scintilla of light on the main issue.

The preponderance of proof is that the instrument dated October 21, 1902, was not the free and conscious act of the decedent, and it must, therefore, be denied probate. In relation to the document of September 25, 1902, the contest is not sustained, and upon the whole record that paper seems to be established and it is admitted as her last will.

The Undue Influence Which Invalidates a Will must be such as relates to the will itself, and operates upon the testator at the time of his making the will: *Estate of Kaufman*, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 191; *Estate of Flint*, 100 Cal. 391, 34 Pac. 863; *Estate of Shell*, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413, 53 L. R. A. 387; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Estate of Holman*, 42 Or. 345, 70 Pac. 908. General influence, not directly brought to bear upon the testamentary act, though strong and controlling, is not enough: *Estate of McDevitt*, 95 Cal. 17, 30 Pac. 101; *Estate of Black*, 132 Cal. 392, 64 Pac. 695; *Estate of Donovan*, 140 Cal. 390, 73 Pac. 1081; *In re Darst's Will*, 34 Or. 58, 54 Pac. 947. The influence must be used directly to procure the will, and must amount to coercion destroying the free agency of the testator at the time of the execution of the instrument: *Estate of Carpenter*, 94 Cal. 406, 29 Pac. 1101; *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Estate of Keegan*, 139 Cal. 123, 72 Pac. 828; *Goodwin v. Goodwin*, 59 Cal. 561; *Hurley v. O'Brien*, 34 Or. 58, 54 Pac. 947; *Estate of Holman*, 42 Or. 345, 70 Pac. 908; *Waddington v. Busby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706, 16 Atl. 690.

When a Will is Contested on the Ground of Undue Influence, the burden of proof is generally on the contestant: *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Dausman v. Rankin*, 189 Mo. 677, 107 Am. St. Rep. 391, 88 S. W. 696; note to *Richmond's Appeal*, 21 Am. St. Rep. 94, 104. See, however, *Estate of Holman*, 42 Or. 345, 70 Pac. 908. Such influence cannot be inferred merely from opportunity and motive: *Herwick v. Langford*, 108 Cal. 608, 41 Pac. 701; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *Estate of Black*, 132 Cal. 392, 64 Pac. 695; *Estate of Donovan*, 140 Cal. 390, 73 Pac. 1081; *Estate of Shell*, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413, 53 L. R. A. 387; *Hubbard v. Hubbard*, 7 Or. 42. But while undue influence is not presumed, still, like fraud, it rarely is susceptible of proof by direct and positive evidence. Hence it is that courts are liberal in allowing a wide range of investigation, and permitting the introduction in evidence of all facts and circumstances, even though of slight significance in themselves, which tend to throw light upon the issue: *Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513; *Blackman v. Edsall*, 17 Colo. App. 429, 68 Pac. 790; *Estate of Shell*, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413, 53 L. R. A. 387; *Dausman*

v. Rankin, 189 Mo. 677, 107 Am. St. Rep. 391, 88 S. W. 696. However, although circumstantial evidence may be sufficient, it must amount to proof; and it has the force of proof only when circumstances are proved which are inconsistent with the claim that the will was the spontaneous act of the testator: Estate of McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Calkins, 112 Cal. 296, 44 Pac. 577.

"The question of undue influence is one of peculiar character; it does not arise until after the death of the one who alone fully knows the influences which have produced the instrument; it does not touch the outward act, the form of the instrument, the signature, the acknowledgment; it enters the shadowy land of the mind in search of its condition and processes. . . . This opens a broad field of inquiry and gives to such a contest over a will a wider scope of investigation than exists in ordinary litigation": Mooney v. Olsen, 22 Kan. 69, approved in Estate of Miller (Utah), 88 Pac. 338. For cases considering the sufficiency of the evidence to establish undue influence, see Estate of Welch, 6 Cal. App. 44, 91 Pac. 336; Estate of Carrigar, 104 Cal. 81, 37 Pac. 785; Estate of Silvaney, 127 Cal. 226, 59 Pac. 571; Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Estate of Tibbetts, 137 Cal. 123, 69 Pac. 978; Estate of Calef, 139 Cal. 676, 73 Pac. 539; Estate of Morey, 147 Cal. 495, 82 Pac. 57; Ames v. Ames, 40 Or. 495, 67 Pac. 737; Estate of Abel (Nev.), 93 Pac. 227.

In Determining the Capacity of a Person to Make a Valid Will, the state of his mind, not the condition of his body, is the object of inquiry. An individual may be in a state of extreme physical weakness and imbecility, he may be in great distress and pain, he may be broken in health or mortally ill, and yet so far retain his mental faculties as to possess testamentary capacity. Furthermore, the fact that one is far advanced in years, and is not immune from the infirmities incident to old age, does not render him incompetent to execute a will. It may be conceded that bodily infirmities may be taken into account in determining whether or not the testator actually was mentally incompetent to make a will, or whether or not he was swayed by undue influences in making the disposition of his property which he did, but of themselves they do not establish testamentary incapacity: 1 Ross on Probate Law and Practice, 24, citing numerous authorities.

ESTATE OF JOHN PATRICK DALTON, DECEASED.

[No. 18,262; decided January 30, 1899.]

Revocation of Probate—Jurisdiction of Court.—The jurisdiction of a probate judge relating to the revocation of probate is wholly statutory, and in exercising it, he can in no way alter or disregard the provisions of the statute.

Revocation of Probate—Executor as a Party.—It seems the executor is not a necessary party to a proceeding for the revocation of the probate of a will, instituted after a final decree of distribution is made and he has been discharged.

Revocation of Probate—Nature of Proceeding—Citation.—A proceeding to revoke the probate of a will is a proceeding in rem and not inter partes; the court already has jurisdiction of the res, and the office of citation is not, like a summons, to give jurisdiction, but to give all parties an opportunity to appear and take sides.

Revocation of Probate—Nature of Proceeding—Discharge of Executor.—Under sections 1327 and 1328 of the Code of Civil Procedure, providing for the revocation, upon a citation to the executor and others, of the probate of a will within one year after probate, an application therefor may be made notwithstanding a final decree of distribution has been made and the executor discharged. The statute keeps alive ad interim the character of the executor for the purpose of hearing the application for revocation.

Revocation of Probate—"Proceeding" or "Action."—An application to revoke the probate of a will is a "proceeding" and not an "action."

Revocation of Probate—Subject Matter and Jurisdiction.—The subject matter in an application to revoke the probate of a will is the same as the subject matter of the proceeding to probate the will. The ultimate issue, to wit, whether the will should stand as probated, is the same.

Jos. M. Nougues, for petitioner and contestant.

Chas. E. Nougues, of counsel.

Sullivan & Sullivan, for respondent.

COFFEY, J. The question in the case at bar, pure and simple, is whether when a will has been admitted to probate any person interested may at any time within one year after such probate contest the same or the validity of the will.

The will of the decedent was admitted to probate, February 16, 1897; a decree of final distribution of the estate was made, entered and filed January 13, 1898; a decree of discharge of the executrix was made, entered and filed January 14, 1898. The petition of certain of the heirs at law of decedent for a revocation of the probate of the will was filed February 11, 1898; and a citation regularly issued and served.

A demurrer to said petition was filed by Kate Dalton, "Executrix of and sole legatee and devisee under the will of John Patrick Dalton, deceased," on various statutory grounds, but on the argument respondent chiefly relied upon the grounds:

1. That the court has no jurisdiction of the person of respondent;
2. That the court has no jurisdiction of the subject of the action;
3. That the court has no jurisdiction to entertain said petition.

THEORIES OF DEMURRANT.

The theories on which counsel for respondent contend that the petition for the revocation of the probate of the will in this case could not be maintained are ingenious, and, at first blush, almost convincing, and may be stated as follows:

1. Because the widow, who was appointed executrix, has been discharged, and the estate has been distributed to the widow as sole legatee, and she could not be sued as executrix.

2. Because by the decree of final distribution the superior court has lost jurisdiction of the estate of Dalton, deceased, to entertain a contest of the will, filed within one year's time.

3. Because the decree of distribution is conclusive of the rights of property of the other heirs at law of Dalton, and as the decree had been made before the year had elapsed for the contest of the will, that deprived the contestants of the time and their statutory rights.

4. Because as the prayer of the petition prays for the relief of further administration and distribution of the property in a manner different from the decree as made, the petition is defective on jurisdictional grounds of contest.

To support the first ground of demurrer above stated, respondent contended that the estate having been finally ad-

ministered and a decree of discharge of the executrix made and entered, that no executrix existed, and as a citation in a case like that at bar is required by section 1328, Code of Civil Procedure, to be issued to (amongst others) "the executors of the will," that, therefore, this proceeding cannot be maintained.

THE GOVERNING SECTIONS OF THE CODE.

Proceedings to revoke the probate of a will are governed by sections 1327-1332, Code of Civil Procedure.

Section 1327 provides in its first clause that: "When a will has been admitted to probate any person interested may, at any time within one year after such probate, contest the same or the validity of the will."

To maintain the contention of counsel for respondent, it is absolutely necessary, first of all, to interpolate in that clause after words, "such probate" the words (or their equivalent) "or prior to a decree of distribution, or of discharge of the executor." Such interpolations in a statute under section 1858, Code of Civil Procedure, are expressly forbidden to the judge.

In the *Estate of McLaughlin*, 1 *Cof. Pro. Dec.*, new edition, page 257, this court has already held that: "The jurisdiction of the probate judge relating to the revocation of probate is wholly statutory. In exercising this power, he can in no way alter or disregard the provisions of the statute."

Sections 1327, 1328, Code of Civil Procedure, provide for the filing of the petition and the issuance of a citation.

And in *San Francisco Protestant Orphan Asylum v. Superior Court*, 116 *Cal.*, at page 447, 48 *Pac.* 379, it is held that the filing of a petition and the issuing of a citation within the year gives the court jurisdiction over the proceeding: See, also, *Estate of Cunningham*, 54 *Cal.* 556, 557; *Estate of Sbarboro*, 63 *Cal.* 5, 8.

In considering the question here, we must always bear in mind the distinctions between the definitions of an executor and an administrator. For definitions, see *Croswell's Executors and Administrators*, pages 3-5; *Wharton's Law*

Dictionary, title "Executor"; Abb. Desc. Wills & Adm., secs. 101-104 et seq.

In the Estate of Chittenden, 1 Cof. Pro. Dec. 1, a statement is made of the

DISTINCTIONS BETWEEN EXECUTORS AND ADMINISTRATORS.

The provisions of the code that a contest may be initiated in one year, and that a citation must be issued to the executor upon the filing of the petition, show the fallacy of the contention that a discharge of an executor so ends his functions of executor that for the purpose of the contest he no longer exists as executor.

If that were so, then all the provisions of the statutes in relation to the revocation of the probate of a will could be set aside and nullified by the action of an executor.

In an estate of the value of \$10,000 or under, the administration can be fully had, and the estate closed in less than six months, and in an estate of over \$10,000 in value, it can be fully administered and distributed in less than one year.

Hence, it would be absolutely necessary for the purpose of sustaining the contention of counsel for respondent to interpolate certain words in section 1327, Code of Civil Procedure.

The case of *Willis v. Farley*, 24 Cal. 491, although that was the case of an administrator, at first reading would appear to be an authority sustaining the position of respondent; but an examination of that case will show that the question as to whether an administrator even after final settlement and discharge in the probate court becomes *functus officio* was not necessary to be decided.

An examination of this case discloses that while the judgment arrived at was undeniably correct, yet the reasoning leading to the result was imperfect. It turned upon the foreclosure of a mortgage given by an intestate to secure a debt, which on his death was, according to the finding of the court, properly allowed as a claim, but not paid by the administrator. The widow and heirs of the intestate were parties defendant in the suit for the foreclosure, and defended, among other things, on the ground that, after final settlement of the estate in the probate court, the plaintiff had

brought an action in the district court to foreclose the mortgage, against the administrators, in which there was judgment.

It is very obvious that the judgment in the former case constituted no bar to that under consideration, for it was not between the same parties. But if, under our statute, the administrator of a deceased mortgagor was a necessary party defendant (after final settlement of his estate in the probate court), then the court could not have rendered the judgment it did, in favor of the plaintiff and against the widow and heirs, who were the only parties defendant; and, if he was not, then his status was perfectly indifferent.

Thus it appears that whether an administrator, after final settlement and discharge in the probate court, became *functus officio* was not necessary to be decided.

Mr. Justice Currey, who wrote the opinion in that case, quotes as authority for his decision on this proposition the case of *Taylor v. Savage*, Exr., 1 How. 282, 11 L. ed. 132, which case, however, decides only that an administrator who has been by the probate court removed for cause can no longer represent the estate.

THE EFFECT OF THE DISCHARGE OF EXECUTRIX.

In the case at bar, the discharge of Mrs. Dalton as executrix does not purport to, nor does it, in terms, revoke her letters testamentary.

By an examination of the decree of discharge, it will be observed that the executrix is simply discharged from all liability to be hereafter incurred. And that is in effect the only thing that is accomplished by a simple decree of discharge. The discharge refers only to acts theretofore done.

As an illustration: Suppose an executor or administrator files an account accompanied with a petition for a distribution showing that he has on hand as a balance of the estate the sum of \$10,000 in money; that this money is distributed by a decree of the court; that vouchers for the payment thereof are filed and thereon the executor or administrator discharged: Can it be contended that subsequently, if it is ascertained that in truth and in fact he had \$20,000

in hand, that the probate court could not cite him to appear and answer in his capacity as administrator or executor?

Query: In an application for the revocation of probate of will is it necessary to serve the citation on the executrix at all?

In *re Whetton*, 98 Cal. 204, 32 Pac. 970, the supreme court says that: "When a will is attacked after probate, section 1327, Code of Civil Procedure, makes the executor a necessary party to the proceeding, etc." Was not the word "necessary" inadvertently used, and should not the word used have been the word "proper," for the reason that section 1329, Code of Civil Procedure, provides that: "Personal service of a citation having been made upon any persons named therein, the court must proceed to try the issues of fact joined, etc."?

And in *San Francisco Protestant Orphan Asylum v. Superior Court*, 116 Cal., at page 447, 48 Pac. 379, the court italicizes a portion of section 1329, Code of Civil Procedure: "Any of the persons named therein."

Further: An executor is not a necessary party to a proceeding like that at bar, for the reason that if the probate of a will should be revoked, he most certainly has no interest, and should the probate be maintained (after distribution and discharge), he has no interest, because he has administered fully the assets of the estate and received or waived his commissions.

Counsel for demurrant contend that all the sections of the code governing the matter, contemplate that a revocation proceeding where resorted to shall be resorted to prior to final distribution and pending the administration of the estate, but in the *Estate of Joseph*, 118 Cal., at page 662, 50 Pac. 768, the supreme court says: "The order admitting the will to probate is not final so long as proceedings may be taken to revoke the probate. In all subsequent stages the contest is but a part of the proceeding to probate the will, and is not a new and distinct proceeding. The subject matter is the same, and the ultimate issue, to wit, whether the will in question should stand as probated is the same."

In *Tapley v. McPike*, Admr., 50 Mo. 589, it is held that an order admitting a will to probate does not become absolute as to those who have a right to contest the will till after the lapse of time in which they have a right under the statute to contest it.

The original decree of the court as regards the probate of a will is not of a final or indefeasible kind. Indeed, it is little more than a *prima facie* declaration, an interim order, so to speak, to enable an executor to act, unless his title shall be disputed and disproved.

THE NATURE OF THE PROCEEDING

To revoke the probate of a will is stated in *San Francisco Protestant Orphan Asylum v. Superior Court*, 116 Cal., at page 453, 48 Pac. 379, to be: "A proceeding in rem and not inter partes. The court already had jurisdiction of the res, and could have proceeded with the trial of the contest without further notice had the statute so provided. The contest could have been treated as an incident in the administration which was already pending. The office of the citation then was not like that of a summons to give jurisdiction. It was an extra protection provided by the statute."

NATURE OF CONTEST OF WILL.

That is to say, the contest of a will is a proceeding to determine the character of the instrument itself. For that reason it is held in *Estate of Doyle*, 73 Cal. 572, 15 Pac. 125, that a default could not be entered against the party failing to appear who had not been served with citation. And this matter seems to have been decided in other contests where the question has arisen; for instance, in *Reese v. Nolan*, 99 Ala. 203, 13 South. 677; *Lyons v. Hammer*, 84 Ala. 197, 5 Am. St. Rep. 363, 4 South. 26; and it has been held in *Blakely v. Blakely*, 33 Ala. 611, *Leslie v. Sims*, 39 Ala. 161, and *Clemens v. Patterson*, 38 Ala. 721, that the object of a citation is to afford the parties interested in the will an opportunity of choosing which side of the contest they will take, and they are not considered parties to the

suit unless they come forward and by some affirmative act engage in the litigation.

EVIDENT PURPOSE OF CONTEST SECTIONS IN CODE.

The evident purpose of sections 1328, 1329, Code of Civil Procedure, is to give all parties an opportunity to appear and take sides in a cause, but the cause in itself not being an action inter partes, but an action, or, rather, proceeding in rem, therefore, it is not necessary that all the parties should be before the court, for if the will be valid and proper parties are before the court to litigate and present the issues, and have the same legally tried, the interests of all parties are preserved by the sustaining of the will, and if, on the other hand, the instrument is invalid, then they have no interest in the property purporting to be granted, devised or bequeathed by the will, for the question is simply the validity or invalidity of the will.

WHAT GIVES JURISDICTION.

In the following cases it is held that the filing of the petition for revocation of probate gives the court jurisdiction: *In re Gouraud*, 95 N. Y. 256; *In re Laytin's Estate*, 15 Misc. Rep. 660, 37 N. Y. Supp. 1125; *In re Phalen*, 51 Hun, 208, 4 N. Y. Supp. 408; *In re Soule*, 46 Hun, 661.

In the *Estate of Crozier*, 65 Cal. 332, 4 Pac. 109, the superior court had revoked the probate of the will and the supreme court says: "Here the revocation of probate and the surcease of appellant's functions as executor became complete eo instante the order of revocation was entered: Code Civ. Proc., sec. 1331."

The executor appealed from the order of revocation, and a special administrator having been appointed, the executor applied for a writ of review to review and annul the order so appointing a special administrator.

DOCTRINE DECLARED BY SUPREME COURT.

The supreme court says at page 333: "It is insisted by petitioner that his appeal stays all further proceedings in the court below, based upon or having relation to the order of

revocation: Code Civ. Proc., sec. 946. The contention in its logical results is that the will still remains a probated will of decedent, and the petitioner still the acting executor, with power to collect assets, pay debts, and do all other acts and things which an executor may do."

And the court, after commenting on this proposition, say at page 334: "The code provides for an appeal from the order of revocation, and therefore the statute keeps alive, ad interim, appellant's character as executor for the purposes of the appeal."

APPLICATION OF THE DOCTRINE.

Applying that doctrine to the case at bar, it logically follows that the code provides for the application for the revocation of the probate of a will at any time within one year after probate, and the issues of a citation (amongst others) to the executor; and therefore the statute keeps alive ad interim the character of the executor for the purposes of the hearing of the application for revocation, notwithstanding he may have been discharged and even in terms (as was not done in the case at bar) his letters testamentary revoked by the order of discharge.

JURISDICTION OF SUBJECT MATTER.

As to the ground of demurrer that the court has no jurisdiction of the "subject" or subject matter of the action: This is a "proceeding" and not an "action": See *Estate of Joseph*, 118 Cal. 662, 50 Pac. 768.

The subject matter in an application to revoke the probate of a will is the same as the subject matter of the proceeding to probate the will, as said in the *Estate of Joseph*, 118 Cal., at page 662, 50 Pac. 768: "The ultimate issue, to wit, whether the will in question should stand as probated, is the same."

THE SUBJECT MATTER OF THIS PROCEEDING

Is the right of the petitioners to have a judicial declaration (should the evidence warrant it) that the will in question never existed, and there can be no doubt of the jurisdiction,

or, in other words, of this court's right to hear and determine that matter.

As to the contention of demurrant that petitioners ask for a further administration of the Estate of Dalton, should the application for revocation be granted and as, according to their contention, the assets and property of the estate having been distributed, there is no estate left to administer upon, and therefore no further administration can be had, that is answered by the suggestion that if the petitioners have invoked relief to which they are entitled, and also some to which they are not entitled, the fact that they have asked too much, is no reason why they should not get that to which they are entitled.

As to the contention of demurrant that in case of the revocation of the probate of this will a different disposition of the estate of Dalton could not be secured from that made by the decree of distribution, see *Samson v. Samson*, 64 Cal. 327, 30 Pac. 979; *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980.

In deciding the matter before the court under the statute governing the proceedings for the revocation of the probate of the will as it is written, the court must ascertain whether petitioners are "persons interested in the estate," of the deceased Dalton; whether "within one year after probate" of his will that they "have filed in the court in which the will was proved a petition in writing containing his '(their)' allegations against the validity of the will or against the sufficiency of the proofs and petitioning that the probate may be revoked"; whether upon filing of the petition the citation required by section 1328, Code of Civil Procedure, was issued, and whether that citation has been served as required by section 1329, Code of Civil Procedure, upon "any of the persons" named in the citation. The record before the court showing that all these questions must be answered in the affirmative, it follows that the demurrer must be overruled, and it is so ordered, with leave to respondent to answer within ten days.

ESTATE OF CHARLES McLAUGHLIN, DECEASED.

[No. 3061; report of referee filed June 4, 1885, adopted and confirmed by the court November 24, 1885.]

Appraisers.—The Court or Judge must Appoint three disinterested persons to appraise the estate of a decedent, and the three appointees must discharge the duty imposed upon them unless they renounce the trust.

Appraisers.—The Provision of the Statute that "Any Two" of the appraisers "may act" only means that the valid action by two of the appraisers, where the third appointee refused to, or for some reason not imputable to the acting two did not act, would be a sufficient execution of the powers invested in and the duties imposed upon the three; and is intended to prevent a failure or invalidation of the whole appointment.

Appraisers—Performance of Duties.—Appraisers are Officers of the court, and, in the execution of their appointment, bound to the performance of a judicial duty, in which the creditors and heirs of the deceased, and the court, are interested and concerned. Whether or not one of the appraisers shall perform his judicial duty cannot depend upon the whim or willfulness of the executor or administrator, or the two other appraisers.

Appraisement—Validity When Made by Two Appraisers.—The legal status of an inventory and appraisement which is merely the act of two appraisers, without an opportunity given to the third appraiser to act and a failure on his part to do so, is that it is invalid, and an imposition and fraud upon the court. Therefore, in the case of appraisements returned by two appraisers only, a statement should be annexed to and form part of their report, showing the reason for the nonaction of the third appointee.

Appraisers.—Persons in the Employment of the Executrix should not be appointed appraisers.

Appraisers.—The Court Should Designate the appraisers of estates of decedents, rather than to accept nominations made by the executor.

Appraisers.—The Compensation of Appraisers is regulated and fixed by statute; the maximum allowance is \$5 to each appraiser for every day's service by him, and evidence of a quantum meruit in excess of that amount is inadmissible.

Appraisers.—The Extent of an Appraiser's Duty was called in question where it appeared "he might have received memoranda as appraiser, or had access to, or knowledge of such, showing a statement of property differing from that returned in the official inventory," and it was suggested that our statute, although vague, seems to con-

vey the idea that the inventory of a decedent's estate is not necessarily made up by the executor or administrator alone, but more properly in conjunction with the appraisers.

Appraisement—Description of Property.—The appraisers, as well as the executor or administrator, must "give a full description" in the inventory and appraisement of every item of property belonging to and character of claim and interest in the right of decedent, and whether it be community or separate property; and "make diligent inquiry" in that regard.

Appraisement.—The Requirements of the Appraisers' Duties as to the Inventory and appraisement, and return thereof, set forth in detail.

An Appraiser's Right to Compensation is Confined to the Days actually and necessarily employed in the appraisement; constructive services or charges will not be recognized. An itemized account of each day (by specific date) employed, and the particular services thereon rendered, must be made and returned as a part of the appraiser's report; and if compensation is waived, that fact must be noted.

Appraisers—Gratuitous Service.—In the Appointment of Appraisers, where the circumstances merit gratuitous service, the court will appoint persons to act without charge; and the court's discretion to make such appointment may be invoked in all proper cases.

In this case the inventory and appraisement was, according to the custom of the court in probate, handed by the clerk, upon filing, to the judge, and the latter noticing that the appraisers' return showed a service of eighty-one days, whereas the bill was \$4,500,—that is, \$1,500 for each appraiser,—ordered that a reference be had to examine into the services performed by the appraisers, and the amount claimed by them as compensation, and appointed Timothy J. Lyons as referee. The referee fixed a time and place for proceeding with the reference and gave notice to the appraisers and all parties interested. The executrix did not appear, but her attorney addressed a letter to the referee refusing to attend, and claiming that the judge's appointment was void, as the law gave him no power to make such an order or reference of his own motion; the appraisers responded in person (their representation by attorneys was only after the coming in of the referee's report), and certain heirs at law appeared by their attorney.

The testimony developed the fact that the appraisers' bill of \$4,500 for services was by special agreement with the executrix upon the claim that if the appraisers traversed every portion of the extended acreage of the country lands, it would involve a large consumption of time and unnecessary labor, and it was therefore a matter of convenience and expediency to all parties that a fixed sum be agreed upon as a reasonable compensation in the premises. (See "An Act to Establish a Tax on Collateral Inheritances," etc., approved March 23, 1893, section 12, Stats. 1893, pages 196, 197.)

It also appeared that one of the appraisers had been a clerk of the decedent, and was familiar with the various properties owned by him, and he was examined by the referee as to his knowledge as to the accuracy of the inventory.

The referee inquired fully into the proceedings of the appraisers by a detailed examination of each of them, and returned with his report a verbatim transcript of the proceedings under the reference from the stenographer's notes. The appraisers were awarded \$405 each, instead of \$1,500 each as charged and collected by them.

The confirmation of the report was opposed by the executrix upon the ground, *inter alia*, that there was no jurisdiction to order the reference; but the court sustained its jurisdiction in the premises and approved the referee's report. Afterward the court ordered published in pamphlet form that part of the report which is here reproduced.

E. P. Cole, for appraisers.

John B. Mhoon, for absent heirs, in support of report.

The REFEREE.—

THE STATUTE AS TO APPRAISEMENTS, ETC.

The law governing . . . all questions involving the making and return of inventories and appraisements of the estates of decedents, and the appointment, duties and compensation of appraisers in connection therewith, is found in sections 1443 to 1451, inclusive; 1469, and 1475 to 1478, inclusive, of the Code of Civil Procedure of this state. But the particular section which is decisive of the questions in

this reference is section 1444, Code of Civil Procedure, perhaps the most important of all the sections relating to appraisers and appraisements, which reads: "To make the appraisement the court, or a judge thereof, must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the court or judge having jurisdiction of the estate, or by the court or judge of such other county, on request of the court or judge having jurisdiction."

THE TWO QUESTIONS UNDER SECTION 1444, CODE OF CIVIL
PROCEDURE.

The two important questions arising under this section are:
1. As to the sanction or authority given to the exercise by two of the appraisers of the powers conferred upon and vested in the required three appointees; under what circumstances it is proper and valid, and to what extent; 2. As to the official character, capacity and duty of the appraisers, and each of them; their right to compensation; upon what it rests, and by whom and how fixed and regulated.

THE PRACTICE OF TWO APPOINTEES ACTING.

As to the first question, it is and has been for years past the custom in probate practice, to more or less extent, for the executor or administrator, with or without his attorney's advice, or for the attorney himself, to select such two of the three appointed and required appraisers as may be suitable to his or their choice for the performance of the "duties imposed upon the three," leaving the third appointee wholly ignorant as to the fact of his appointment, or if the fact should come to his knowledge (and the present judge of the probate department, Hon. J. V. Coffey, has found it necessary to make a rule that the clerk give official notification of all appointments), insisting upon the legal right to

dispense with his services—to disregard the appointment. This practice is not carried on with the permission of the court or judge, but often, if not nearly always, in open and indifferent opposition to the wishes and legal judgment of the court; and further, it is not merely excused, but claimed to be justified, by the “very letter of the law.”

THE STATUTE AS TO THE POWER OF TWO OF THE APPOINTEES
AND THE REASON OF IT.

The following is the “letter of the law,” found in section 1444, Code of Civil Procedure, quoted above, which, as we have said, is not offered in extenuation, but confidently referred to in legal justification of the practice, to wit: “The court, or a judge thereof, must appoint three disinterested persons (any two of whom may act).” Upon this language it is substantially argued by those who pursue or countenance the practice referred to, that though the law provides that there must be three appointees, yet any two of them may choose for themselves, or permit themselves to be chosen by the parties interested, to the exclusion of the unchosen third appointee (with entire indifference as to the necessity of his knowledge or consent), as those of the appointees who shall perform “the duties imposed upon the three.” It may be remarked here as worthy of note that the statute nowhere authorizes the court or judge to appoint, in any case, two appraisers in the place of three; neither does it give, nor in any manner intimate, the power or authority on the part of the court or judge to select or authorize the selection of the two appointees, who “may act” under the appointment to the three; nor has such power or authority been ever judicially claimed or assumed, nor do we believe it would be claimed to exist under the statute. Is it possible, then, that what the court or judge—the sole appointing power—cannot do or authorize, can be done by a person interested, or by any two of the appraisers? Without dilating upon it, it is undoubtedly true, as a general proposition, that where the “very letter of the law” is relied upon in opposition or indifference to the spirit and apparent intention, as well also the plain common sense of the thing, it must lead to the

evident absurdity that the result of the contention in this case brings us to, in the proposition that, although the law prescribes that the court must appoint three disinterested persons to execute an important judicial duty, yet any two of the appointees may themselves arbitrarily choose or permit themselves to be interestedly chosen to perform such duty which the law mandatorily provides that three must be disinterestedly appointed to perform. The statute, in using the language, parenthetically ("any two of whom may act"), obviously meant no more than that the valid action by two of the appraisers, where the third appointee refused to, or for some reason not imputable to the acting two did not act, would be a sufficient execution of the powers invested in and the duties imposed upon the three.

Without specifically inquiring into them, it is easily conceived that many contingencies might arise where one of the appraisers would not or could not act, and the law, with this in view, undoubtedly made the provision that such an occurrence would not cause a failure of or invalidate the whole appointment. However it is noticeable that in section 1475, Code of Civil Procedure, it is provided, with reference to the appraisal of the homestead and report thereof, that: "Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser." It might be contended that by this section the intention of the law is shown to be that in all cases the appraisers should take the oath, and proceed to the execution of their duties, but that the agreement of two in the act of appraisal is a sufficient execution of the appointment. This contention would seem to be true, at least in the case of the appraisal of the homestead. Another thing is noticeable in the language of section 1475, just quoted, in that it provides how the appraisers "may discharge the duties imposed upon the three." The mere reading of this can leave no other impression than that this duty is imposed by the order of appointment, especially as the statute nowhere else speaks to the contrary; this view seems also in complete agreement with the language of section 1445, Code of Civil Procedure,

which provides that the appraisers take an oath "before proceeding to the execution of their duty"—a duty evidently considered as imposed by the provisions of the preceding section (1444, above quoted), prescribing the order of appointment.

This view is further in accordance with the settled principle that, where one is appointed to a position of trust, and especially so in the case of an official trust, like the appointment of appraisers, unless a renunciation is shown, the law will presume an acceptance.

Now, it cannot be questioned that appraisers are officers of the court, and in the execution of their appointment bound to the performance of a judicial duty—a duty that cannot be underestimated—in the execution of which the executor or administrator, the creditors, heirs and the court are interested and concerned. The work of the appraisers is to the court, the creditors and the heirs, the beacon light and safeguard respecting the knowledge and value of the estate. Can it be said, then, that whether or not one of the appraisers shall perform such judicial duty depends upon the whim or willfulness of the executor or administrator, or the two other of the appointees? Does the renunciation or acceptance of the official trust devolving upon this one appraiser, by the order of appointment, rest upon the decision of either or all of the parties named, without the knowledge, permission or consent of the appraiser? These questions bring their own answers—even an agent of the appraiser could not determine, or be appointed to determine, this personal trust for him.

AUTHORITIES AS TO THE POWER OF TWO APPOINTEES.

The following authorities are submitted as decisive of the view to be taken upon this question:

In Caldwell on Arbitration (second American edition), the author says, at page 202: "If a cause be referred to three persons, and they, or any two of them, have power to make the award, it may be signed by two only, provided the third have notice of the meetings, and be not excluded by force or fraud"; citing *Mackintosh v. Blythe*, 1 Brod. & B. 269.

In *Burton v. Knight*, 2 Vern. 514 (acc. Kel. 132; and see *Ives v. Metcalf*, 1 Atkyns, 64), a submission was to three arbitrators, or any two of them. "The award was set aside, and it was observed by the court, upon this occasion, that where parties submitted their differences to three arbitrators, or any two of them, and one of such persons was excluded by force or fraud from the meetings held for determining the matter, that alone would be enough to vitiate the award."

Strong animadversion was also cast by the court upon the partiality apparent in permitting one party to be present at their meetings, without having given the other an opportunity to attend: *Caldwell on Arbitration*, pp. 209, 210. To the report of this case in second Vernon, the following note is appended at page 515: "The ground expressly taken by the Lord-keeper for confirming the decree at the rolls is: 'For that there appeared a design and fraudulent exclusion of Roger Hudson the third arbitrator, and that thereby the other two arbitrators, Shallet and Nash, had assumed to themselves that power which was intrusted to all three.'"

Particular attention is directed to the language of this case last underscored, as peculiarly applicable to the probate practice under discussion. . .

Without a seeming desire to quibble about words, it may be noticed that in the above quoted cases the submission to arbitration was to three persons, or any two of them; whereas, our statute respecting appraisers prescribes and the order of appointment is to three persons, not to three or any two of them—the further provision that two "may act," meaning, as we have shown above, to become effective only in a proper case, and to prevent the failure of the entire order.

PENAL LIABILITY IN CASE OF UNAUTHORIZED APPRAISEMENT BY TWO.

If, as shown by the above citations, in the case of a submission to arbitration by the parties themselves, an award which is the result of a practice precisely the same as that often adopted in the making and return of appraisements in probate is thereby tainted and vitiated, so as to be rendered fraudulent, is not the probate practice which we have been

considering—where the appointees are not the choice of the parties interested; but the selection of the court, and ipso facto its officers—a fraud and imposition upon the law and the court, and do not all the parties implicated in the violation of the law become liable not merely to the animadversion of the court, as they did in the cases cited—where the arbitrators were not officers of the court, but only the appointees of the parties—but to such penalties as it might consider proper?

LEGAL STATUS OF APPRAISEMENTS BY TWO.

We conclude, then, on this head, that the legal status of an inventory and appraisal which is merely the act of two appraisers, without an opportunity given to the third appraiser to act, and a failure on his part so to do, through declination or other cause entitling the two other appraisers to proceed without him, is that it is invalid and fraudulent, and the act of the two appraisers without such sufficient cause is a willful violation of the law, and an imposition and fraud upon the court appointing them. If this view be adopted by the court, it might be advisable to make a rule respecting inventories and appraisements returned signed by two appraisers only; perhaps that in such cases a statement of the acting appraisers, subscribed by them, showing the reason for the third appraiser not acting, should be annexed to and form part of the appraisal.

APPRAISERS MUST BE "DISINTERESTED PERSONS."

It was developed in the proceedings on the reference that two of the appraisers . . . were at the time of their appointment, had been, and continued in the employment of the executrix individually, also that their appointment was at the suggestion and solicitation of the executrix, and the matter was called to the court's attention. There can hardly be a doubt that they were both improper persons for the office of appraiser, in view of their relationship to the executrix at the time of their appointment; even in the case of arbitration, where the interested parties themselves appoint the arbitrators, it is naturally held that no person in the em-

ployment of or pecuniarily obligated to the parties is qualified to act—even a cousin has been excluded on account of his mere kinship. . . . This circumstance illustrates the danger of such suggestions being at all entertained by the court; and the following authoritative statement as to the New York statute, upon which our own is based, is perhaps worthy of consideration in this regard: "The surrogate has the selection of the appraisers, and the reason of the statute would seem to require that he should designate these officers in order to insure as well competency as impartiality in the discharge of their duties": Dayton on Surrogates, p. 244.

OFFICIAL CHARACTER OF APPRAISERS AND THEIR COMPENSATION.

As to the second question proposed above under section 1444, Code of Civil Procedure—the official character, capacity and duty, and the compensation of the appraisers—no difficulty can be perceived. The appraisers being appointed by the court for the performance of a judicial duty, are of course ipso facto officers of the court for that purpose; therefore their character, capacity and duty are official.

Their compensation, and how and by whom it is fixed and regulated, rest upon the following simple and plain language of said section 1444, viz.: "Who [the appraisers] are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements."

AUTHORITIES AS TO THIS COMPENSATION.

In the Succession of Caballero, 25 La. Ann. 646, the court of last resort of Louisiana held: "The law fixes fees of appraisers; where illegal charges are apparent on the face of the record, they can be corrected." Here the court, of its own motion, reduced the charge of \$300 to \$16.

In Walton v. Creditors, 3 Rob. (La.), 438, held: "A notary's fees being fixed by the law, he can under no pretense demand additional compensation." In this case the court said: "The lower court ruled that 'evidence to establish a quantum meruit is entirely misplaced in relation to

those official services for which a tariff is fixed by law.' It does not appear to us that the court erred. If the fees allowed to notaries by law for services rendered by them be insufficient, they must seek relief by an application to the legislature for a new tariff or by resigning their offices. Courts of justice cannot countenance any other mode."

So, in *Hawford v. Adler*, 12 La. Ann. 241, held: "A notary cannot increase his legal fees for official acts by evidence of a quantum meruit for extra services. A relaxation of the rule would make the fee bill a dead letter." (Also: *Dayton on Surrogates*, p. 255; *McClellan's Surrogate's Court Practice*, 2d ed., pp. 371, 372; *North's Probate Practice* (Ill.), sec. 316; *Horner's Probate Law*, sec. 182.)

CONCLUSION AS TO BASIS AND LIMIT OF COMPENSATION.

The above authorities necessitate no comment or explanation, nor does the statute itself.

We therefore conclude that the law fixes the fees of appraisers in conjunction with the allowance by the court; that the maximum allowance is \$5 to each appraiser for every day's service by him; that evidence of a quantum meruit in excess of \$5 per day is not admissible; and under no pretense, nor by any ingenuity whatsoever, can the law be evaded or violated.

APPRAISER'S DUTY IN CONNECTION WITH THE PREPARATION OF THE INVENTORY, SECTIONS 1445, 1449, CODE OF CIVIL PROCEDURE.

The extent of the appraiser's duty was called in question on the reference, it appearing that "he might have received memoranda as appraiser, or had access to or knowledge of such, showing a statement of property differing from that returned in the official inventory."

While our statute is not as clear as it could be, yet we believe the same idea is found in sections 1445 and 1449, as is clearly expressed in the New York statute, namely: That the inventory is not necessarily made up by the executor or administrator alone; but more properly in conjunction with the appraisers. In section 1449 it is clearly expressed that the

appraisers must sign the inventory, and that then the executor or administrator must take and attach the oath as to its correctness. This oath seems proper upon reading the section (especially in connection with section 1445) only after the inventory and appraisement have been completed; not before the appraisement has been made, as is always the practice.

**NOTE AS TO SPECIAL INSTRUCTIONS AND SPECIAL
RULE OF JUDGE COFFEY AS TO APPRAISE-
MENTS AND APPRAISERS.**

Under directions of Judge Coffey whenever appraisers are appointed by him, the clerk sends a printed notification to each appraiser, as follows:

[Title of Court and Cause.]

I am instructed by the Judge presiding in the Probate Department of the Superior Court to inform you of your appointment as Appraiser in the above estate.

Accompanying this notice is the following:

Instructions to Appraisers.

The attention of appraisers is especially called to the provisions of the law governing them in the discharge of their duty. (Part III, Title XI, Chapter IV, Article I, Code of Civil Procedure.) The compensation of appraisers is limited to five dollars a day for each day of actual service. No "constructive" charge will be allowed. The subjoined directions should be read and pursued by appraisers:

1. Before proceeding to appraise the property take and subscribe the oath on the first page of this blank; this may be done before any officer authorized to administer oaths.
2. Set down in the inventory all money belonging to deceased; if there be none, state that fact.
3. Give a full description of all real estate and the improvements thereon, and set down the value thereof in dollars and cents in figures in the right-hand column opposite.
4. All other personal property, setting down each article separately, with the value thereof in dollars and cents in figures opposite to the articles respectively, including all debts,

partnerships and other interests, bonds, mortgages, notes and other securities for the payment of money belonging to the deceased, specifying the name of the debtor in each security, the date, the sum originally payable, the endorsements thereon (if any) with their dates, and the sums which, in the judgment of the appraisers, may be collected on each debt, interest or security.

5. Appraise the property at its actual value as near as you can, as you are sworn to do so, as the court depends on the appraisement to know the value.

6. Make diligent inquiry and find out all the property belonging to the estate, and state, as far as the same can be ascertained, what portion of the property is community property, and what portion is the separate property of the deceased.

7. Foot up the value of the several items, and set down the total at the bottom of the column in dollars and cents in figures, certify to the total value of the property, and sign the certificate at the foot of the inventory.

8. If you require pay for your services as appraisers, fill out claim on page two of this blank, sign and swear to same.

Judge Coffey has also promulgated the following as a part of his special rules in probate.

Appointment of Appraisers.

In the matter of the appointment of appraisers, attorneys may nominate to the court for appointment one person, and no more, subject to the court's approval. In all cases where the circumstances merit gratuitous service the court will appoint competent persons to act without charge.

Admonition to Appraisers.

Nota Bene.—The attention of appraisers is especially called to the provisions of the law governing them in the discharge of their duties. (Part III, Title XI, Chapter IV, Article I, Code of Civil Procedure.) The compensation of appraisers is limited to five dollars for every day *actually and necessarily* employed in the appraisement. No "constructive" charge will be allowed. In case no charge be made and compensation

is waived, that fact must be noted in the *return* of the appraisers: See Stats. 1893, pp. 196, 197.

In all proper cases the discretion of the court may be invoked to appoint competent appraisers to act without compensation.

An Itemized Account by Appraisers Necessary.

The attention of appraisers is also directed especially to the necessity of making an *itemized* account of their charges and disbursements. *Day and date* must be given in *every* instance. Experience has taught the Court the necessity of rigorously enforcing this rule, which, although in existence for years, has been occasionally disregarded. It is enjoined, therefore, upon the appraisers appointed by the Court to preserve *data* in *detail* of their charges and *annex the same to their report*.

IN THE MATTER OF THE ESTATE OF ADOLPH SUTRO, DECEASED.

[No. 51 (new series); decided October 30, 1905.]

Jurisdiction of Probate Court—How Far Extends.—Prior to the amendment of 1895 to section 738 of the Code of Civil Procedure, jurisdiction to determine the rights of heirs, devisees and legatees, and the validity of testamentary trusts, appears to have been vested exclusively in the superior court sitting in probate.

Trust—Determining Validity Prior to Probate of Will.—Under section 738 of the Code of Civil Procedure, as amended in 1895, the validity of a testamentary trust in real estate may be determined in advance of the probate of the will, in a suit to quiet title or to determine an adverse claim.

Appeal—Affirmance Without Opinion.—The affirmance of a judgment by an appellate court, although without an opinion, is a determination that the objections argued against it are unavailing.

Probate Jurisdiction—Regulation by Legislature.—The probate jurisdiction of the superior court is essentially under the control of the legislature, which may enlarge or restrict it.

Charitable Trusts—Parties in Suit to Quiet Title.—In a suit to quiet title, which involves the validity of a charitable trust created by will,

the court held that, in the circumstances of the case, the primary trustees sufficiently represented the beneficiaries, and that neither the attorney general nor the ultimate trustees in being were necessary parties defendant.

Charitable Trusts—Invalid Accumulations.—Section 723 of the Civil Code, which provides that "all directions for the accumulation of the income of property, except such as are allowed by this title, are void," applies to accumulations for charities.

Charitable Trusts—General Charitable Intent.—The testamentary trust involved in this case is found by the court not to evince a "general charitable intent" which will be given effect so far as is consistent with the rules of law, if the mode prescribed is unlawful.

Charitable Trusts—Purposes "Charitable or Other."—A testamentary trust which contemplates purposes "charitable or other" cannot be sustained as a charitable trust.

Charitable Trusts—Noncharitable Purposes.—If some of the purposes of a testamentary trust are charitable, while some are not, no part of it is sustainable as a charitable trust, if the bequest violates the law regulating the validity of private trusts.

Bishop & Wheeler, Charles S. Wheeler, J. F. Bowie, and Garret W. McEnerney, for Applicants.

Bradley & McKinstry, J. C. McKinstry, Morrison & Cope, R. D. Silliman, for Opponents.

COFFEY, J. Adolph Sutro died in the city and county of San Francisco, state of California, on the eighth day of August, 1898, leaving a will dated May 22, 1882. The will contained a large number of specific bequests and devises, while a large tract of land, comprising a portion of the San Miguel Rancho and part of the Cliff House Ranch, in the city and county of San Francisco, was reserved and made the subject matter of an attempted trust. The provisions by which it was attempted to create this trust are as follows:

"XXV I will and direct that the title in fee of said parcels of land marked I and II last hereinbefore described and each thereof shall go in trust, into the hands of my executors, to be by them preserved and managed for and during the period of ten (10) years after my death, and then by my executors to be conveyed in trust, to the board of trustees hereinafter provided for, but not to be sold or disposed of by anyone having the charge or management thereof dur-

ing the life of the last survivor of my children mentioned in this will, and at the death of said last survivor, or as soon thereafter as may be deemed, by the board of trustees hereinafter mentioned for the best interest of the Trust herein-after created and appointed, I will and direct that the bulk or the whole of said parcels of real estate marked as aforesaid I and II shall be sold by said board of trustees, as speedily as possible, but in the manner they shall deem best, for realizing the largest amount, and the funds realized from such sales, shall be managed and applied by said Board of trustees for such charities, institutions of learning and science and for premiums to be set apart for distinguished scholarships and scientific discovery and inventions as shall be directed by my said executors; such directions by my executors shall be filed and recorded in the County Recorders office at the City and County of San Francisco, State of California, within three (3) years after my death, and the directions so given, filed and recorded within the time so prescribed, shall be obligatory and binding upon said Board of Trustees, and in default of said executors giving such directions within the time and in manner aforesaid, I direct that said Board of Trustees at once organize and elect proper officers for such organization, and within twelve months thereafter designate, select and appoint by resolutions entered on their minutes such application of the funds realized from such sales, but strictly within the purposes and objects herein by me mentioned, as they may deem best, for record with said County Recorder, a copy of such resolutions, and my executors shall upon a default on their part as aforesaid have no further right to give such directions to said Board.

"XXVI The said Board of Trustees shall consist of the Governor of the State of California; the chief Justice of the Supreme Court of the State of California; the presiding Judge of the Superior Court of the City and County of San Francisco; the United States Circuit Judge for the district of California; the Mayor of the City of San Francisco; the President of the Chamber of Commerce of San Francisco; the President of the board of Regents of the University of California and their successors in office; and six other members

to be chosen by the above named officers, three from amongst the leading Bankers of San Francisco, and the other three from amongst my male descendants, or those of my brothers, bearing the name of Sutro; and in case of the abolishment of any of the offices named, or the reorganization of the government or Courts of the State of California; or of the City and County government of San Francisco, effecting a change in the name or office of any of the officers mentioned, the remaining trustees shall immediately proceed to select officers filling positions corresponding thereto as near, as in their judgment may be.

“XXVII At the end of the ten years herein mentioned for the execution of the trust and duties of my executors as aforesaid, and prior to the conveyance herein provided to be made of said property to said board of Trustees, my executors shall obtain in writing from the officers herein named to constitute part of said board, their acceptance of said Trust, and also the acceptance in like form of the six members thereof to be elected as aforesaid and in case of any of such officers or such members elect shall decline, or for thirty days thereafter neglect so to signify their acceptances such vacancy or vacancies shall be filled by the members who have accepted out of other incumbents of Federal, State or County or city officers and other persons as the case may be.

“The acceptances and declinations herein mentioned shall be filed in the permanent archives of the Board.

“XXVIII Two thirds of said Board of trustees, at any meeting thereof shall have full power to execute all duties of their trust and a majority of my executors shall have full power to act in the discharge of their duties.

“XXIX In order that my executors, or in their default, the trustees, shall in respect to the directions they are authorized to give, be able to act more intelligently in carrying out my instructions, they shall offer in three of the leading newspapers of San Francisco, of New York and of London, England, by an advertisement in each of said papers, and pay the sum of fifteen hundred dollars for the best practical treatise upon the application and management of the funds to be realized from such sales, in conformity with the gen-

eral outlines herein expressed; one thousand dollars for the second in merit of said treatises and five hundred dollars for the third in merit of said treatises.—But my executors are not authorized, but are expressly prohibited, to direct the application of any of the funds realized from the sale of said lands to any institution or charity or purpose, which is in any degree sectarian or in the management of which any priest, clergyman, minister or rabbi, or other religious officer shall have any voice or control, and said Board of Trustees are in like manner prohibited from making any such application.

“XXX My executors, during the time that they shall have the charge and management of the parcels of real estate herein referred to and numbered I and II, may lease the same for said term, collect rents, pay taxes, assessments and the necessary expenses connected therewith, and in case there shall remain a surplus, may employ such surplus in the improvement of said property in such manner as to increase its value and income.—And said board of trustees shall, after they take the management and charge of said property in like manner lease and collect the rents thereof, and out of the same pay taxes, assessments and necessary expenses and employ any surplus in the improvement of the property by erecting buildings or otherwise. But in case the rents and income from all the property shall not be sufficient to defray such charges and expenses, or other things required to preserve the ownership, they may, as a last resort, dispose of enough of said real estate to pay the same.

“XXXI In respect to that part of the Cliff House ranch, herein mentioned, I direct that it shall be sold only as a whole, and that before it can be disposed of to any other purchaser or purchasers, it shall be first offered for sale to the city and County of San Francisco at a price which shall be twenty (20) per cent less than the highest bona fide bid therefor by any other party, such bona fide bid to be ascertained, by inviting bids therefore by public advertisement for six months; but such sale to the City and County of San Francisco shall be made on the express condition, that it shall be kept perpetually as a place of public resort, and should said

city and county elect to purchase said property, on said terms and conditions, said board of trustees and their successors are authorized and directed to make such sale.

"XXXII I hereby expressly declare it is my intention that the parcels of land herein referred to as part of the San Miguel Rancho and part of the Cliff House Ranch and numbered I and II, shall on the death of the last survivor of my said children vest in said board of trustees and their successors, in trust, that the same may be sold and the proceeds therefrom be applied to the uses and purposes, charitable, educational and other, which are, in this my will, provided and specified."

In October, 1898, and before the instrument dated May 22, 1882, had been admitted to probate, as the last will of Adolph Sutro, deceased, an action was begun in the superior court of the city and county of San Francisco, by Clara A. Sutro, Edgar E. Sutro, Kate Nusbaum, and Rosa V. Morbio, plaintiffs, against Emma L. Merritt and W. R. H. Adamson (the persons named as executrix and executor respectively under the will), as trustees under the instrument purporting to be a will of Adolph Sutro, deceased, dated May 22, 1882, and Emma L. Merritt, George W. Merritt, her husband, and Charles W. Sutro, defendants.

The action was in form a suit to quiet title. The complaint alleged that the plaintiffs were the owners of an undivided two-thirds of certain real property described in the complaint; that the defendants Merritt and Adamson claimed to be trustees under an instrument purporting to be the will of Adolph Sutro, deceased, dated May 22, 1882, and that as such trustees they claimed an interest in the property adverse to the plaintiffs, which claims were without right or foundation; that Charles W. Sutro and Emma L. Merritt claimed an interest adverse to the plaintiffs, which claims were also without right or foundation, and that none of the defendants had any interest in said property, either as trustees or otherwise. The plaintiffs prayed that the adverse claims of the defendants be determined, that all questions concerning the validity of any gift under the purported will of Adolph Sutro be finally adjudicated, and that it be ad-

judged that the defendants did not have as trustees or otherwise, any right, title or interest to said property, and that they be enjoined from asserting any such right, title or interest.

Charles W. Sutro suffered a default to be entered against him. The defendants Merritt and Adamson as trustees, and Emma L. Merritt and George W. Merritt, her husband, individually, filed a joint answer to the complaint, in which they denied the right of the plaintiffs to the property described, admitted that the defendants Merritt and Adamson asserted to be trustees under the purported will of Adolph Sutro, and that they claimed an interest in the property as such trustees, but alleged that their claims were not without right or foundation, and that they had an interest as such trustees in the property described.

In an affirmative defense and counterclaim the defendants averred the ownership of the property by Adolph Sutro, his death, the due execution of the will in question, and set out in full those portions of the will which provided for the charitable trust, alleging:

"Seventh: That in and by the terms and provisions of said will, and more particularly the paragraphs thereof referred to and set forth in this answer, all the lands and premises described in said complaint and in this answer were conveyed, transferred and devised to the defendants, Emma L. Merritt and W. H. R. Adamson, as trustees, to be by them preserved and managed for and during the period of ten (10) years after the death of said testator, Adolph Sutro, and then by said defendants and trustees to be conveyed in trust to a board of trustees, as provided in said will, for charitable purposes, and said Emma L. Merritt and W. H. R. Adamson, as said trustees, are the owners of said property, and entitled to the possession of the same, subject only to the execution of the trust, and neither all nor any of said plaintiffs have any estate or interest in said property, nor are they the beneficiaries, nor is any of them the beneficiary, of said trust."

The defendants then prayed that their rights as trustees under the will be adjudicated.

Upon a stipulation by the parties that judgment should be rendered for the plaintiffs, unless a lawful and valid trust was created by the will, the court rendered judgment for the plaintiffs, expressly finding that the plaintiffs were the owners of the property described; that the trusts attempted to be created by the will of Adolph Sutro were void, and that the defendants, as trustees, had no interest therein.

On January 19, 1899, the will of Adolph Sutro, deceased, was admitted to probate.

On May 22, 1903, a petition for partial distribution was filed by Kate Nusbaum, and others, asking distribution to them, as heirs at law, of the property included in the alleged trust, claiming that as to this property Adolph Sutro had died intestate. In granting the application for partial distribution the following opinion was rendered:

The first question to be considered here is as to the validity and effect of the judgment in *Sutro v. Merritt*, No. 65,811, department 10, superior court.

It is claimed by petitioners that the judgment in that case governs the present application, forasmuch as it determined that the trusts attempted to be created by the will of Adolph Sutro were void.

Opponents argue that the judgment is void, and does not bind this court in this proceeding, for the equity department had no jurisdiction of the subject matter, as the superior court, in probate, was and is vested with exclusive power to determine the rights of heirs, devisees and legatees, and the legislature did not and could not confer this jurisdiction upon the court in equity. It is also claimed that there was a defect of parties necessary to a complete adjudication of the essential issue. The action was in form a suit to quiet title, but in reality its purpose was to determine in advance of probate the validity of certain provisions in an instrument purporting to be the will of decedent; and the judgment of the court was, after due hearing and consideration, that the provisions in question were void because the trust attempted to be created therein was not intended wholly for charitable purposes, but was intended for purposes partly charitable and partly other than charitable; and that the purposes for

which it was intended are vague and uncertain, and cannot be made certain; and that it cannot be determined what proportion of his estate the said testator intended for charitable purposes and what proportion he intended for purposes other than charitable; and that the attempted trust was intended for purposes not authorized by law and that the testator intended to create a perpetuity in a portion of his estate, contrary to the constitution and laws of California, for purposes other than charitable. The parties to that action were substantially those who are petitioners and respondents herein.

The defendants, Merritt and Adamson, as trustees, and Emma L. Merritt and George W. Merritt, her husband, individually appeared and answered, putting in issue the main question of the validity of the testamentary trust clauses, and prayed that the rights of the trustees be adjudicated. Their attorneys of record appear to have been E. W. McKinstry, and R. H. Lloyd, the former of whom is now deceased, and the latter is not now connected with the trustees. The attorneys for the plaintiffs in that case are the same representing the petitioners in this proceeding. No appeal was taken from that judgment; and, if the court in equity was competent to pronounce it, nothing remains for this tribunal but to acquiesce in its conclusion. The only question, therefore, presently to be examined, is the competency of the court sitting in equity to deliver that judgment. Its power in the premises seems to me to be dependent upon the amendment of 1895, for, prior to the passage of that amendatory act, it had been held that, under our present judicial system, the subject matter was within the exclusive province of the court sitting in probate. This is the tenor of the main decisions relied upon by the trustees, although it is contended by petitioners that in none of the cases cited was the question directly involved, and that the language of the opinions was mere dicta. The late Justice Temple expressed himself very strongly in favor of exclusive jurisdiction, although he made but one allusion to the amendment and that in the *Estate of Freud*, 134 Cal. 333, 66 Pac. 476, where he said it did not

apply. He does not appear elsewhere to have made any reference to the act.

It is claimed, however, that all doubt is set at rest as to the application of this amendment to such controversies as *Sutro v. Merritt* by a decision of the supreme court which must here be held conclusive as affirming the proposition that the act of 1895 authorizes such a suit: *Fair v. Angus*, 132 Cal. 581, 64 Pac. 1111. If this be so, this court need not burden itself with the task of further examination of authorities, for that one should seem sufficient; but, it is maintained by respondents that the case cited is not authority, as the question here under discussion was not even remotely suggested, much less argued or considered, therein; and, when that decision was rendered, the trust had been declared invalid in *Estate of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 64 Pac. 1000. Whether or not the amendment of 1895 was enacted for the purpose of enabling the Fair heirs to obtain the construction of the will before probate, it is certain that advantage was taken of that act to institute an action prior to probate to determine an adverse claim made by them to certain real estate; and that in that action it was contended that by virtue of the amendment to section 738, Code of Civil Procedure, the court was authorized to determine the validity of the trust, irrespective of the probate of the will, or of any proceeding that might be taken in the administration of the estate. This contention was sustained by the superior court and an appeal was taken, and the opinions are to be found in 60 Pac. 442. Justice Harrison, who wrote the main prevailing opinion on that appeal, stated, after alluding to the points presented, that it was unnecessary to determine the question because of the decision in the *Estate of Fair* rendered simultaneously.

At the same time Justice McFarland, in the course of a dissenting opinion upon the other question, incidentally said that there was a preliminary point as to the right of plaintiff, as heir, to maintain the action, which point was pressed by some of the counsel for appellants and waived by others; but this right, he declared, was plainly given by section 738 of

the Code of Civil Procedure, as amended in 1895. Upon the rehearing of the case, the judgment of the superior court was affirmed, and Justice Garoutte said that in view of the decision of affirmance just then delivered in the Estate of Fair, wherein they had held the will invalid, there was no practical reason why the appeals in the other case should be considered in extenso upon the various matters presented by counsel in their briefs, for the first decision being to the effect that neither the trustees nor the beneficiaries taking any estate by the will, the judgments rendered in these causes and the orders denying the motions for a new trial should be affirmed, and it was so ordered.

It is here claimed by petitioners that in view of the fact, which, it is said, appears plainly from the opinions on the former hearing, that the right of the plaintiff to maintain such an action was argued, the affirmance of the judgment necessarily involved a decision that the action was properly brought, and that the view of Justice McFarland, in his dissenting opinion on the original appellate hearing, that this right of action was plainly given by the amendment of 1895, was correct, and that, therefore, this court is bound by it as authority directly in point, the mere circumstance that no opinion was written not lessening its weight. As to the effect of an affirmance without an opinion, attention is directed to the remarks of Mr. Justice McKenna, speaking for the court, in *Fidelity and Deposit Co. v. United States*, 187 U. S. on page 319, 32 Sup. Ct. 120, 47 L. Ed. 197, wherein the principle is announced that where a decision of the court of last resort affirming a decision of an inferior court sustaining the validity of a rule is rendered without an opinion, it is not a proper inference that the supreme court considered the rule of doubtful validity, but rather that it regarded the grounds of challenge as without foundation. If this be the rule of decision, it would seem to dispose of the contention of respondents that *Fair v. Angus*, 132 Cal. 581, 64 Pac. 1111, is not an authority, and to enforce the conclusion that the superior court in *Sutro v. Merritt* had jurisdiction of the subject-matter; and to render unnecessary any further discussion as to the power of the legislature to enact the amendment. As to this last

point, however, that the legislature was not authorized by the present constitution to permit heirs and devisees to litigate their respective titles to the lands of a decedent under whom they severally claim, and that it cannot curtail the exclusive jurisdiction of the superior court, as constitutionally conferred, "of all matters of probate," including the interpretation of a will so as to affect or determine the rights of distributees among themselves, reference may be made to the opinion of Justice Garoutte in *Estate of Davis*, 136 Cal., on page 597, 69 Pac. 412, in which he says that the probate jurisdiction of the superior court is essentially under the control of the legislature, which may enlarge it or may restrict it; and that the character and extent of the jurisdiction are not only under legislative control alone, but the procedure by which that jurisdiction may be invoked and rights thereunder adjudicated is expressly laid down by statute; and that procedure must be followed or relief cannot be secured. Justice Harrison and Van Dyke concurred in these views, and the former subsequently wrote the opinion in *Martinovich v. Marisano*, 137 Cal. 354, 70 Pac. 459, in which Justice Garoutte and all the other justices joined, wherein the phrase "matters of probate" was defined, the court remarking that by the constitution of this state the superior court is vested with jurisdiction "of all matters of probate," but its exercise of that jurisdiction is regulated by statute. If we are to compare this language with that quoted from Justice Garoutte in the *Estate of Davis*, the meaning of both would seem to be that the legislature has the power to add to or take from, "to enlarge or restrict," "to regulate," in this sense, the jurisdiction. As has been pointed out, in argument, and in the judicial remarks quoted, the nature of the proceedings in which this jurisdiction shall be exercised, is entirely a matter of legislative regulation. Several instances have been cited in which the legislature has added to powers in probate matters formerly cognizable only in equity. No question has been raised as to the validity of these legislative acts. After a careful consideration of the arguments of counsel, this court is of opinion that the amendment of 1895 to section 738, Code of Civil Procedure, was designed to determine the validity of

devises contained in a will in advance of its probate and that the superior court in equity had jurisdiction of the subject matter in *Sutro v. Merritt*; but it is said that the judgment in that action is not controlling because of the lack of necessary parties. This point is discussed at length in the briefs of counsel, but it would be impracticable to do more in this place than to state conclusions. This court is of opinion that, in the circumstances of this case, the primary trustees sufficiently represented the beneficiaries, and that neither the attorney general nor the ultimate trustees in being, and who were named in the will, were necessary parties. The language of the will in paragraph 25 would seem to convey, in so many words, the title in fee to these trustees, and its effect is not impaired by the words of paragraph 32, besides the devise, if it shall be so considered, is not to the ultimate trustees as individuals, but as a board. The testator declared his intention that the property shall vest in "said board of trustees." Until the organization of the board, there would be no one in being in whom the property could vest. This seems to the court to be the meaning of the will, and, therefore, the individuals alluded to were not essential parties to the controversy in equity. This appears to have been the theory of all parties and their counsel at the time of the litigation in *Sutro v. Merritt*. This court does not feel justified in declaring void the judgment in that action on any of the grounds assigned, and it does not deem necessary further discussion, as it is important that the decision should be delivered without undue delay.

If the foregoing views be correct, the matter has been adjudicated, and there should be no occasion for this court to inquire into the validity of the trust clauses in the will; but the other questions have been discussed with such learning and thoroughness that it would not be courteous to counsel to dismiss them without adverting to the points presented. The arguments comprise several hundred pages, and exhibit great research and ability, and the court has given to them serious study, but it is not desirable to write an opinion covering all the ground traversed by counsel.

The will undertakes to create a trust for charitable uses by setting apart a large tract of land not to be sold or disposed of until such time after the death of the last survivor of testator's six children, as may be deemed by a board of trustees, not now in existence, to be for the best interests of the trust; the income to be accumulated and the land held until the termination of the trust, at which time the property shall be sold and the proceeds applied to "the uses and purposes, charitable, educational, and other," provided and specified in the will, "such charities, institutions of learning and science, and for premiums to be set apart for distinguished scholarships, scientific discoveries, and inventions" as shall be directed by his executors, within three years after his death. This devise is defended on the ground that the proceeds of the sale of property are to be applied to charitable purposes, and therefore it may be sustained. The position of the petitioners, primarily, is that the devise is contrary to public policy as declared by the constitution, which provides against the holding of large tracts of land, uncultivated and unimproved, by individuals or corporations as against the public interest and to be discouraged by all means not inconsistent with the rights of private property.

So far as private property is concerned, the rule against perpetuities prevails. The principle stated in the constitution is substantially the English rule against restraints upon alienation of lands, even for charitable purposes. The rule and its history need not be rehearsed here. The reason of the rule was of universal application. It is contended, however, that in this state the only limitation upon a testator's right to give to charitable purposes is that contained in the Civil Code, which permits a devise of not more than one-third of his estate, and that it is settled in California that perpetuities may be created for charity and the lands rendered inalienable, and that, in any event, the court could and would direct a sale of the property before the death of the surviving child, if the public interest required it; and that the bequest, being intended for charity, should not be declared void, if it can possibly be made good.

As to that part of the will which provides for accumulation, it is claimed by the trustees that if the provision violate the statutory rule, the only result is that the income should be devoted at once to charitable uses, and that an unconditional gift to charity is not affected by a direction for accumulation which is too remote, for the income becomes immediately distributable in charity and the only effect of an unlawful direction is that the fund becomes available for the charity, the donee for charitable uses thus becoming the legatee of the income. It would seem, however, that in the case at bar this provision cannot be maintained, as it is repugnant to the statute which declares that all directions for the accumulation of the income of property, except such as are allowed by title two of the Civil Code, are void, and this clause does not appear to be an exception. So far as the research of this court has extended, this provision is not supported by statute or authority.

It is said that, in any event, there is nothing in the code forbidding accumulations for charitable purposes, and that the sections quoted are inapplicable to charities, and that the court may grant relief, if the period of accumulations is unduly extended by the terms of the trust, but otherwise should not interfere, when the will exhibits a general charitable intent which will be effected as far as is consistent with the rules of law, if the mode prescribed be unlawful, and here the dominant purpose of the testator being charitable, it should be upheld. Even though a general charitable intent is evident in the will, the court is bound by the terms of the instrument. The supreme court has said that it is not what the testator meant, but what his words mean, for his intention is to be ascertained by his expression and not by conjectures as to what may have existed in his mind. We must take the will as we find it and construe all its words according to their common import. The testator may have had a general charitable design, but it is not shown by the language chosen to execute his purpose, certainly not by paragraph 29, which excludes from the scope of its operation enumerated classes whose work is mainly that of beneficence and charity. Plainly, he did not favor any charity conducted by any such classes or

persons, when he closed his bounty to those under whose auspices practically all the charities in the country are managed. If we are to interpret his intention, according to the rules of law, giving effect to every word, it is difficult to deduce a general charitable intent by which the attempted trust can be sustained. The general intention must be carried out by apt and appropriate words, and the court is restricted in its construction to what is found in the will.

Numerous attempts have been made to define a charity, in the legal sense, without satisfactory result. Quite a collection of definitions is to be found in the brief by trustees, in one of which, by Mr. Binney, charity is defined to be whatever is given for the love of God or the love of one's neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish. The trustees claim that, measured even by this severe test, the bequest here should stand. It is submitted, however, that subjected to the severity of this test the bequest must fail, for the testator denied his benefaction, "expressly prohibited," to any institution or charity or purpose which is in any degree sectarian or in the management of which any priest, clergyman, minister, or rabbi, or other religious officer shall have any voice or control, and said board of trustees are in like manner prohibited from making any such application. It has been said by an English judge that it is probably impossible to define what is a charitable bequest, and it may not be advisable to attempt to do so; but, in one sense, at least, charity is not illustrated in the proscriptive sentiment of the clause quoted nor does it seem, as trustees claim, to correspond to the calls of Binney's definition, nor does it answer the primitive signification of the term, which is, according to Webster, "love; universal benevolence; goodwill." It is described by the apostle, as the greatest of virtues, and the speech of Lincoln at Gettysburg proclaimed "malice toward none and charity for all." But here we have a bequest the spirit of which is repugnant to the principles of charity as commonly understood. How can it be said to express a general charitable intent, when it precludes the possibility of its application to any institution, charity, or

purpose in which any minister or professor of religion has any concern? It is not a question of any particular denomination; it is a question of almost universal exclusion of those by whom substantially all charities are administered. None of these can be aided without directly violating the intention of the testator. There is no intention here to impugn the motive of the testator; his philanthropic purpose cannot be assailed; his aim to create a trust which might benefit his fellowman may be admitted, but he is not the first testator to have missed his mark through mistake in the choice of the means by which success might be secured.

What was his purpose in creating this trust? Its character must be determined by its terms. No matter how good his motive, it should be distinctly and definitely described; but in this case the description of the beneficiaries includes indefinite classes which may or may not be charitable, and an authority relied upon by respondents decides that where a bequest is made for charitable purposes and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void.

If, for instance, a bequest is made for such charitable, or other purposes, as the trustee should think fit, the whole bequest will be void: *Estate of Hinckley*, 58 Cal. 509.

It is plain that there are objects in the will noncharitable as well as charitable, and the court is not at liberty to discriminate. It cannot imagine an intent that the testator has not expressed. The testator refers to his purposes as "charitable and other." In one paragraph he describes disjunctively his devisees as "any institution or charity or purpose."

It would seem, according to the authorities, that the words "or other" are of the very substance of the scheme which the testator saw fit to adopt for the purpose of carrying out and giving effect to his philanthropic design. The court is unable to adopt a construction which involves a rejection of these words altogether unless such construction is necessitated by clear and unmistakable evidences of the testator's intention, found in the other provisions of the will. In the construction of wills, every word is to have its effect, provided an effect can be given to it not inconsistent with the general intent of

the whole will, taken together; for a testator is not to be supposed to have used words without meaning, if it is possible to give them a consistent meaning and the rule is not to reject any words unless there cannot be any rational construction of those words as they stand: *Taylor v. Keep*, 2 Ill. App. 368.

The bequest itself is not made definitely and exclusively to charity, but it may be devoted to purposes noncharitable.

Respondents insist that the "other" purposes are also charitable, and that testator meant by his inclusion of the word "charities" to call attention to those "charities" which he particularly favored, or he used the word in the more restricted and common sense of relief or alms to the poor; but this subtle distinction cannot be accepted by the court in the face of the express terms of the will. The bequest must stand or fall, as the testator has seen fit to make it.

No matter how meritorious may have been his motive, the testator has failed to express his purpose so that it might be capable of legal enforcement. The reasoning of respondents, plausible and ingenious as it is, has not convinced the court that the scheme of the will is either practicable or legal, and while the court has desired to treat the various heads of the subject in a manner that might convince counsel that their work has been studied and appreciated, it is not expedient to extend this opinion to greater length.

Application granted.

An Appeal in the matter of the Estate of Sutro was dismissed in 152 Cal. 249, 92 Pac. 486, 1027.

IN THE MATTER OF THE ESTATE OF JOSEPH GORDON, DECEASED.

[No. 18,338; decided August 18, 1904.]

Inheritance Tax—Statute of Limitations.—The defense of the statute of limitations is applicable to a proceeding against executors for the collection of collateral inheritance tax. Such a proceeding is barred under the provisions of section 338, Code of Civil Procedure, by the lapse of three years after the accrual of the liability; and the liability is complete at or before the close of the administration.

Inheritance Tax—Limitations.—If the Executor Occupies the Position of a Trustee for the state as to the collateral inheritance tax, this relation does not continue in the manner to prevent the running of the statute of limitations after proceedings have been had to fix the tax, and the amount thereof fixed and ordered paid, and the residue of the estate distributed and the administration closed.

Inheritance Tax—Former Adjudication.—The establishment by a court of the collateral inheritance tax payable by an estate is an adjudication upon that subject which binds the state as well as the estate, as to all questions passed upon.

Joseph Gordon died February 11, 1897, or twenty-six days before the enactment of March 9, 1897, amending the collateral inheritance tax statute, went into effect. He left a will disposing of all his estate, and giving it all to his niece, excepting only \$14,500 in pecuniary legacies to other collateral relatives and \$1,400 in several small legacies to charities. The administration of his estate was commenced by the filing of his will on the nineteenth day of February, 1897, and in the course of the administration the county treasurer, in discharge of what he deemed to be his duty under the collateral inheritance tax act, made application to the court for an order upon all the legatees and devisees under the will to show cause why they should not be required to pay the tax provided by the act. This application was made by petition filed on May 24, 1898, whereupon a citation was issued to and served upon all the persons interested in the estate, and on June 4, 1898, returned and filed herein; and thereafter, on June 9, 1898, the court made its order assessing and fixing the collateral inheritance tax payable out of the estate and directing its payment.

At the time these proceedings were had, it was contended on behalf of the residuary legatee and devisee under the will that all the provisions of the enactment of 1897 were constitutional and effective, and that section 2 of that enactment making its exemptions applicable to all property which had already passed, except where the tax had already been paid, had the effect of exempting that portion of the estate which went to the testator's niece. This view (probably acceded to by the treasurer at that time) was adopted by the court, and by its order of June 9, 1898, therefore, it directed payment of collateral inheritance tax on the pecuniary legacies aforesaid amounting to \$14,500 and assessed and fixed the tax payable thereon at \$725; and with reference to the residue of the estate, the language of the order is as follows: "And all the rest, residue and remainder of said estate is, and the legacies and legatees mentioned in said will other than those above named are, exempt from said collateral inheritance tax."

Upon these proceedings being had, the executors, in obedience to the court's order, made June 9, 1898, the payments therein directed, and afterward, to wit, on August 13, 1898, presented and filed herein their final account showing such payment to have been made, together with their petition for the final distribution of the residue of the estate to the persons entitled. Upon due notice given of the settlement of this final account and of the hearing of this petition of final distribution, the court made, on August 26, 1898, its decree of final settlement and distribution, finding that all taxes, debts, expenses and charges of administration had been paid, and directing the payment by the executors of the residue of the estate to the legatees and devisees in the manner and proportions in the decree specified. In compliance with this decree, the executors, as shown by their vouchers, thereafter filed, paid over and delivered all the property and estate remaining in their hands, and on December 15, 1898, filed herein their vouchers showing such to be the fact to the satisfaction of the court; whereupon the court made, on the last-named day, its decree of final discharge of the executors, adjudging and declaring the estate to have been fully administered and the trust settled and closed, and since that

time no portion of the property of the estate has been in the possession or under the control of either of the executors, and neither of them has had any interest therein.

Thereafter the supreme court, in the case of *Estate of Stanford*, 126 Cal. 112, decided that the provisions of section 2 of the enactment of 1897 are unconstitutional so far as they apply to any estate which had passed prior to the enactment, because they were tantamount in effect to a gift of public property rights already accrued, thus establishing, as a matter of law, that this court had erred when it made the order it did herein declaring that the estate bequeathed to the niece was exempt from the tax. No appeal, however, has ever been taken from any of the orders made herein, and the time for appeal from them has long since expired; and no motion has ever been made for relief from the effect of any of the orders or decrees herein because of any inadvertence, surprise or mistake or excusable neglect.

Arthur G. Fisk and Clay P. Gooding, for the city and county treasurer.

Edward C. Harrison and James C. Adams, for the executors.

COFFEY, J. 1. The first contention made on behalf of the treasurer in support of his application now before the court is that the statute of limitations does not bind the state with regard to the collection of the collateral inheritance tax; and in support of this he cites several authorities, all of which have been carefully examined and considered by the court.

The language of the statute upon which reliance is placed to obviate or avoid this defense is as follows: "All administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as herein-after directed."

The Political Code (section 3716) contains the following language: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien

removed until the taxes are paid or the property sold for the payment thereof."

The language of the provision last above quoted is at least as strong as that above quoted from the statute under consideration; yet it has been distinctly held that it has not the effect of suspending the operation of the statute of limitations: *San Francisco v. Jones*, 20 Fed. 188; *San Diego v. Higgins*, 115 Cal. 170, 46 Pac. 923.

And it is expressly provided in the statute of limitations itself (Code of Civil Procedure, section 345), that the limitations prescribed in that chapter apply to actions brought in the name of the state or for the benefit of the state in the same manner as to actions by private parties.

As against these authorities, those cited on behalf of the application do not seem to me to have prevailing effect. The Pennsylvania decisions are based upon the maxim "*Nullum tempus occurrit regi*," which is held to apply with strictness, except in those cases where the state has chosen to bind itself by the statute of limitations; and this maxim is expressly enacted out of our law by the provision of Code of Civil Procedure, section 345, already mentioned.

Vanderbilt's Estate, 10 N. Y. Supp. 239, cited by counsel for the treasurer, holds that the collateral inheritance tax is a tax upon the devolution of property and not a penalty or forfeiture, and, therefore, that the provisions of section 384 of the New York Code of Civil Procedure, providing that an action upon a statute for a penalty or a forfeiture is barred by the lapse of two years, does not apply; thereby holding and deciding (impliedly, at least) that the provisions of section 282 of the same code, which provides that the lapse of six years will bar an action upon a liability created by statute other than a penalty or forfeiture, does apply.

Russ v. Crichton, 117 Cal. 695, 49 Pac. 1043, relates to the issuance of a tax deed to the state, and to the limitation provided by section 3788, Political Code, as amended in 1895 before the statute had been amended so as to provide for the sale to the state of property for delinquent taxes, and is certainly not as nearly in point upon the question of limitation in a case of this kind as are the authorities hereinbefore mentioned. The doctrine of *San Diego v. Higgins*, *supra*, is

in no manner limited or modified there; and the case is not even referred to. The broad distinction between the two cases, so far as this particular point is concerned, lies in the fact that section 3788, Political Code, is not a part of the same chapter with section 345, Code of Civil Procedure.

This same section 345, Code of Civil Procedure, interferes also with the application of the case of *Strongton v. Baker*, 4 Mass. 526.

2. Counsel for the treasurer contends further that the executors occupy the position of trustees for the state with reference to this tax, and that as such trustees they are not entitled to the benefit of the statute of limitations. The most that can be said for this proposition, however, is, that it might possibly suspend the beginning of the running of the statute until the executors settled their final account and closed their trust as such, by applying for, and obtaining, their final discharge.

If the executors are trustees at all in this connection, they are trustees of an implied trust only, and in such case the statute will run: *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; *Raymond v. Simonson*, 4 Blackf. 77; 27 Am. & Eng. Ency. of Law, 1st ed., 102, and cases cited.

But even if the executors should be considered as trustees of an express trust, that trust was closed when their authority as executors ceased upon their final discharge after compliance with the decree of final distribution, and if the state ever had a cause of action against them, it had a complete cause of action at that time, and if it has not now become barred it never will: 13 Am. & Eng. Ency. of Law, 1st ed., p. 688, and cases cited; *Clarke v. Johnston*, 85 U. S. 493, 21 L. Ed. 904; *Coleman v. Davis*, 2 Strob. Eq. 334.

In *Clarke v. Johnston*, supra, Mr. Justice Miller said: "It may be conceded that, so long as a trustee continues to exercise his powers as trustee in regard to property, that he can be called to an account in regard to that trust. But when he has parted with all control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert

themselves in his favor, and time begins to cover his past transactions with her mantle of repose."

The fact that before the executors in this case applied for final distribution of the estate, proceedings had been had to ascertain and fix the tax, and ascertain and prescribe the duties of their trust in that regard, and that tax and those duties as so ascertained and fixed had been paid and discharged by them, makes their position upon the statute of limitations even stronger.

As against the proposition that these executors are trustees only of an implied trust, if trustees at all as to this matter, counsel for the treasurer cite specially in their reply brief the case of *Luco v. De Toro*, 91 Cal. 405, 27 Pac. 1082; but in that case the express trust mentioned and considered by the court was one created by a contract entered into between Hartman and the decedent Olvera in his lifetime, and it was with reference to that trust that the court there laid down the rule which requires some open disavowal of the trust relations created by the contract, and notice of such disavowal, in order to set the statute running.

And whatever may be said of the trust character of the relation between the administrator or executor and the state with reference to the collateral inheritance tax, it would seem that it can only apply after all to such sum as shall have been ascertained and fixed by the court in the manner provided by the statute as properly belonging to the state and payable by the administrator or executor as collateral inheritance tax. And that sum, so ascertained and fixed, has been paid.

3. Counsel for the executors have contended also that the order of this court made June 9, 1898, amounted to a former adjudication, which is a bar to this application by the treasurer; and this contention seems to be well grounded in the authorities cited.

In Pennsylvania the statute provides (Act of May 6, 1887, section 20) that "the lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied." And under that statute was rendered the decision of the supreme court of that state in *Money Penny's Estate*, 181 Pa. 309, 37 Atl. 589, in which the court said:

"The error, if there was one, was due to the appraiser's erroneous judgment, deliberately reached upon knowledge of all the facts. The commonwealth seeks, and the court has sustained, a second appraisal to revise the judgment of the appraiser. Clearly this cannot be done. The plain statutory remedy for such a case is not a second appraisal, but an appeal from the first."

In New York, the original statute (Statute of 1885, chapter 483) contains language identical to that of our statute hereinbefore quoted. Subsequently it was amended (Laws of 1892, chapter 399, section 3) so that it now provides that "Every such tax shall be and remain a lien upon the property transferred until paid to the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment."

The decisions of the New York court cited by executor's counsel are the following: *In re Nevin*, 20 Misc. Rep. 550, 61 N. Y. Supp. 956; *Rice's Estate*, 29 Misc. Rep. 404, 61 N. Y. Supp. 911; *Crerar's Estate*, 67 N. Y. Supp. 795, 56 App. Div. 479; *Wallace's Estate*, 28 Misc. Rep. 603, 59 N. Y. Supp. 1084; *Bruce's Estate*, 59 N. Y. Supp. 1083; and *Schermerhorn's Estate*, 57 N. Y. 26, 38 App. Div. 350.

Most of these decisions, and perhaps all of them, were rendered before the amendment of 1892, but whether before or after is immaterial for the present purpose, for, as already stated, the original act of 1885 is identical with the provision of our statute, and the amendment of 1892 is couched in even stronger language.

In re Nevin was a case where the question arose very much in a similar manner as here. A bequest to Mr. Chauncey M. Depew of \$20,000 was reported by the appraiser as not subject to tax, because he was an executor, and the will provided that in view of the bequest he should charge no commission, and because it had been held by the supreme court in the case of Gould that such legacy was not subject to tax. Later the court of appeals reversed the supreme court in the Gould case (156 N. Y. 423, 51 N. E. 287), and in the light of the law as there laid down it was sought to get a second appraisal and collect the tax on Mr. Depew's legacy; and this, it was

held, could not be done, and the decision in *Money Penny's Estate* (*supra*), cited with approval.

In *Rice's Estate*, *supra*, the court said: "The appraisement proceeding furnishes an opportunity to the parties interested in the estate, on the one hand, and the state, on the other, to inquire fully as to the value of the property at the time of the decedent's death, and to obtain and present such testimony as may aid in the ascertainment of such value. Upon the proofs thus taken the appraiser makes his report, and the surrogate enters an order assessing and fixing the tax. This order is an adjudication in respect to the liabilities thereby fixed, and unless an appeal is taken therefrom is conclusive on all parties thereto."

And in the opinion in *Crerar's Estate* appears the following: "It seems clear that this property was brought to the attention of the appraiser, and that he held that it was not subject to the tax. The surrogate had no jurisdiction to cause it to be reassessed because it was erroneously held exempt, nor to have it reconsidered or again passed upon in any form."

These authorities are criticised by counsel for the treasurer, but are the only authorities furnished upon the point, and seem to sustain the contention.

In the opinion of the court, the application is barred by the provisions of section 338 of the Code of Civil Procedure, and also by the former adjudication of this court upon the matter; and the citation, therefore, will be discharged, and an order entered to that effect.

ESTATE OF LUCY G. GOODSPEED, DECEASED.

[No. 17,053; decided August 14, 1904.]

Will Contest.—The Rule that a Complaint must State the Cause of action in ordinary and concise language applies to the written grounds of opposition to the probate of a will. The facts should be stated concisely and with certainty, apart from all hypotheses, arguments and conclusions of law; and when once made the statement should not be repeated.

Will Contest—Misjoinder of Causes of Action.—Charges of fraud and duress constitute different causes of action, and should be stated separately.

Will Contest—Charging Conspiracy.—Where one is charged in a pleading with conspiracy with other persons, he has a right to have the names of the alleged conspirators made known to him.

Delmas & Shortridge, for proponents and respondents,
Daniel Sullivan and Frank N. Myers, executors.

F. C. Lusk, Reddy, Campbell & Metson, Knight & Hegerty, for Annie Amelia Stanford, Orville C. Pratt Goodspeed, and Jennie Maud Snodgrass, contestants.

Garret W. McEnerney, for Goodspeed minors.

COFFEY, J. Unusual labor has been imposed upon the court, in this preliminary phase of a will contest, by reason of the multifarious and multiform grounds of the motion and demurrer. There are over sixty specific objections to the contest included in the motion, and as many more grounds of demurrer, most of them different from those covered by the motion, forty typewritten pages in all, and all of them requiring a most careful examination of a complaint of fourteen typewritten pages in length.

As to many of the points, it is not unlikely that if they stood alone or were isolable upon this motion the court would disregard them as too tenuous and technical, but it must be said in justice to the pleader that the form employed in this contest is not without precedent, and I find upon scrutiny of the records in this class of cases many complaints similar in form, so it cannot be said, in face of the facts, that "the complaint in this case, as a pleading, has no precedent" (Green

v. Palmer, 15 Cal. 414, 76 Am. Dec. 492), although it may be remarked that the time has come when, under the objections and demurrer presented, the principles of pleading applicable to ordinary civil actions should be applied to contests in probate, according to the intention of the code: Code Civ. Proc., sec. 1312.

There is no valid reason why the rule of the statute that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language should not be applied strictly to the written grounds of opposition to the probate of a will: Code Civ. Proc., sec. 426.

Applying this rule to the complaint of contest here, it is obnoxious to demurrer on three grounds, indicated in subdivisions 5, 6, and 7, section 430, Code of Civil Procedure, as specially pointed out in the demurrer here interposed. But the motion must be dealt with in its order of priority in procedure.

THE MOTION TO STRIKE OUT PARTS OF CONTEST.

The motion to strike out the contest as a whole should be denied, saving the right to the respondents to have an amended contest filed, stating clearly and concisely the grounds of opposition to the probate of the proposed will.

With respect to the particular parts of the motion granted, it may be well to premise the principles of pleading appropriated and adapted from *Green v. Palmer*, 15 Cal. 411-417, 76 Am. Dec. 492, and applied to the merits of this motion.

Facts only should be stated; facts, as contradistinguished from the law, from argument, from hypotheses, and from the evidence of the facts. A legal inference or conclusion from the facts should not be stated; that is not the province of the pleadings under our system, which is to develop the facts. Argument in pleading is equally inappropriate. Hypothetical statements are improper. The respondent's pretenses are equally improper. Each party must allege each fact which he is required to prove, and he must allege nothing affirmatively which he is not required to prove. Nothing should be stated which is not essential to the claim or defense; or, in other words, none but issuable facts should be

stated. If this part of the rule be violated, the adverse party may move to strike out unessential facts. All statements should be concisely made, and when once made must not be repeated. The code does not permit long pleadings; on the contrary, it enjoins conciseness everywhere, and if in any pleading written under its rule there be an unnecessary word, it is there in disregard of code provisions. If an immaterial statement be inserted, or even an unnecessary word, the court has the power to strike it out. To avoid repetition, as well as to obtain conciseness, logical order is necessary. There should be no difficulty in setting forth any occurrence in its logical, which is its natural order, and if this be done and the pleader set forth only the facts upon which his case depends, using no more words than are necessary, we shall have brevity and substance, and we shall hear no more of long pleadings, unnecessary recitals, or immaterial averments.

Although nearly forty years have elapsed since these rules were reaffirmed by Mr. Justice Field in *Green v. Palmer*, the necessity still remains of repeating them from time to time, as is shown by numerous cases in the California Reports during the intervening period.

These rules establish the principles of pleading in probate as in all other courts, and they but illustrate the maxim of Coke that "the law speaketh through good pleading," or, "the order of pleading being preserved, the law is preserved," for it is "the living voice of the law itself."

Applying these rules to the contest here, the proponents contend that their motion to strike out the argumentative, hypothetical, and repetitive allegations, as well as the conclusions of law, and the evidentiary matters therein averred, should be granted.

The contest is addressed to a certain instrument propounded for probate, and, therefore, the motion to strike out such phrases as "pretended will" is proper, for, as the rule laid down in *Green v. Palmer* says, if there be an unnecessary word, it is in disregard of code provisions and should be ousted. It is apparent that mention of the instrument in contest identifies it, for the purpose of pleading, and that the words "or pretended will" are redundant; that the word "pretended" is argumentative, and one which the contestants

need not deny, but that the very form of the allegation would make a denial so involved as to conceal the real issue.

Contrary to the rule that a statement once made must not be repeated, there are several repetitions throughout the contest.

In the opinion of this court, the subject matter of the sixth ground of objection is especially worthy of censorious attention; the tender of issue concerning the condition of the decedent at the time of her death. This is clearly not pertinent, necessary, relevant, nor material to the issues, and not involved in a proceeding of this nature.

In the same paragraph of the contest (paragraph V) there is much more obnoxious matter, involving argument and evidence, and clearly repugnant to the rules recited.

Paragraph VI of the contest is vicious to a degree. In other paragraphs are alleged, in so many words, fraud, duress, menace and undue influence. These are but conclusions of law, and tender no issuable fact, in the manner stated.

This is common law and common learning, as was said in *Spring Valley Waterworks v. San Francisco*, 82 Cal. 321, 16 Am. St. Rep. 116, 22 Pac. 910. It is not sufficient to aver fraud in general terms; the facts constituting the fraud must be alleged. This has been held from the beginning in California.

I know of no better statement of the rule for pleading these matters than that laid down by Mr. Justice Myrick in the *Estate of Gharky*, 57 Cal. 279: "In stating the grounds of contest, if unsoundness of mind is relied on, it is sufficient to state that the deceased, at the time of the alleged execution of the proposed paper, was not of sound and disposing mind; unsoundness is the ultimate fact to be found, and acts of inebriety or other causes are to go to the jury, from which they are to find; and the issue upon that subject is to be of the ultimate fact only; but when the grounds of contest embrace duress, menace, fraud, undue influence, due execution and attestation, subsequent will or the like, such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded, not in the language of the statute, but the facts (not evidence of the facts) relied on must be

stated, and issues relating thereto submitted to the jury, to the end that the court, either upon demurrer to the statement of the grounds of contest or upon the verdict, may determine whether, as matter of law, such facts so pleaded or found constitute a valid reason why the proposed paper should not be admitted to probate. This course is plain, logical, direct, and is a certain guide to the court, to counsel, and to the jury; the other course leads to uncertainty as to what is relied upon, and to doubt as to what may be the basis of the verdict."

I conceive that this pleading is faulty in nearly all the respects indicated in the formal objections, especially because of its argumentative and evidentiary shape, and the objections numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, should be and are sustained.

These words and matters tender no issue, and serve only to detract from that logical directness and simplicity of statement which ought always to be observed in a pleading. They have no place in a pleading, and should be struck out on motion: *Miles v. McDermott*, 31 Cal. 273.

The objections specified and enumerated are sustained and the motion as to them granted, and as to the rest denied.

The result of this decision upon the motion is shown by the paper hereunto appended, the contest as it appears with the objectionable matters removed.

THE DEMURRER.

The demurrer should be sustained because, as it stands, it becomes necessary to modify the pleading and bring it within the rules already adverted to, so that the respondents may answer direct allegations, to the end that the issues involved may be clearly presented to the court upon the trial of the contest.

Particular attention is directed to the first ground of demurrer—that the contest misjoins several causes of action. It is self-evident that fraud and force cannot be exercised by the same person on the same person at the same time to

achieve the same end. The evidence required to sustain the charges of fraud and of duress or menace would necessarily be opposed one to the other. Requiring different evidence they constitute different causes of action within the purview of the code, and under section 427, Code of Civil Procedure, the grounds should be separately stated.

The distinction between the physical cause of injury and the legal cause of action is clearly stated by Mr. Justice Harrison in *Thelin v. Stewart*, 100 Cal. 372, 34 Pac. 861, and by the same justice, speaking for the court in bank, in *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56.

The fifth paragraph of the contest may be pointed out particularly as obnoxious to criticism: "That the said Lucy C. Goodspeed, deceased, at the time of her death, and also at the time when said instrument or pretended will was signed by her (if the same ever was signed by her), was a person of great physical and mental imbecility."

It should seem unnecessary to argue upon the objectionable character of this clause.

The allegations throughout the contest amounting to a charge of conspiracy on the part of Daniel Sullivan and other persons unknown to the contestants are plainly demurrable, for certainly the proponents have a right to know the names of the conspirators.

In support of the various objections on the score of ambiguity and uncertainty citations are scarcely necessary, but two or three may be mentioned: *Miles v. McDermott*, 31 Cal. 271; *Jamison v. King*, 50 Cal. 132; *In re Flint*, 100 Cal. 391, 34 Pac. 863; Code Civ. Proc., secs. 1312, 1713.

The contest should be amended so as to present the issues concisely and with certainty, apart from all hypotheses arguments, and conclusions of law.

Demurrer sustained. Ten days to amend.

ESTATE OF THOMAS H. BLYTHE, DECEASED.

[No. 2401; decided November 24, 1886.]

Administrator—Right to Expend Money on Foreign Lands.—

A demurrer to the "Petition of administrator for leave to expend \$10,000, or such other sum as may be sufficient, to preserve the Mexican lands from forfeiture under the conditions of the grants," was sustained on the ground that the order prayed for was beyond the jurisdiction of the court to make.

Administrator—Right to Expend Money on Foreign Lands.—

A previous ruling of the court, authorizing an administrator to deal with lands situated in a foreign jurisdiction, does not justify an adherence to such ruling if, upon a new application, the true character of the issue, as a jurisdictional one, is exposed.

Administrator—Right to Deal with Foreign Lands.—

An administrator has no legal right to deal with lands situated in a foreign country as if they were within the local jurisdiction.

Administrator—Authority Over Foreign Lands.—

A California administrator has no power officially in Mexico over lands there; and the facts in this case show that neither personally nor by virtue of his office can he claim or take title to lands there.

Administrator—Responsibility for Foreign Assets.—

While an administrator must include in his inventory all estate of his decedent coming to his possession or knowledge, it does not follow that he is bound to account for assets situate in a foreign jurisdiction.

Administrator—Authority in Foreign Country.—

A California court cannot endow its appointee with any official character as administrator beyond the borders of the state, and when he appears elsewhere, he is simply a citizen abroad without any representative faculty whatever.

Administrator—Authority Beyond Territory of Appointment.—

Where an administrator has no power beyond the territory of his appointment, he can have no duty with respect to any matter extra-territorial.

Administration.—Under the Mexican Jurisprudence there are no administrations with respect to the successions of decedents.

Administration.—An Executory Contract is not Itself an Asset; it is the subject matter of the contract that is. This principle applies to an executory contract with respect to foreign realty, which is not a local asset for administration purposes.

Probate Court—Chancery Jurisdiction.—The superior court, sitting in probate, has no chancery side.

Probate Court—Limited Jurisdiction.—The superior court, sitting in probate, deals only with administrations, and cannot assume jurisdiction, except the object upon which it is to operate is before it.

Administrator—Liability in Dealing with Foreign Lands.—As there is no obligation upon an administrator to go into a foreign country and deal with lands there, consequently no liability can be claimed on his part to have attached to him officially by reason of his having done so.

Inventory—Assets in Foreign Jurisdiction.—Code of Civil Procedure, section 1443, with respect to the inventory of decedents' estates, does not enlarge the well-settled liability of administrators. That section relates only to estates actually or in legal contemplation within this state.

The subject matter of this opinion concerned property in Mexico, which the administrator and his attorney believed to be of great value. The property consisted of lands lying on the Colorado river, and as partly then appeared in evidence, and was subsequently during the administration more fully developed as a fact, an unlimited amount of money might be required to reclaim said lands; and a competent engineer, who had in Blythe's lifetime professionally visited the property, on Blythe's retainer, testified that had Blythe lived long enough he would, in all likelihood, have dissipated his valuable estate in San Francisco in his efforts to improve and protect these Mexican possessions.

John A. Wright, for Public Administrator Roach.

Edward R. Taylor (attorney appointed by the court for unknown heirs), for demurrants.

W. W. Cope, for Andrade, an associate of Blythe in his lifetime in the Mexican enterprises.

R. B. Wallace, also for Andrade.

John M. Burnett, for Wm. Savage, claiming to be an heir.

COFFEY, J. This is a demurrer to an application entitled "Petition of administrator for leave to expend \$10,000, or such other sum as may be sufficient to preserve the Mexican lands from forfeiture under the conditions of the grants." A similar petition (except that the amount asked for was not specific) was filed September 6, 1886, and

a demurrer thereto overruled October 22, 1886; but the court denied the application, deeming it inexpedient to proceed further with the Mexican project. The administrator having revived his petition upon the assumption that the court might favorably regard a limited application, it becomes necessary again to inquire into the legal merit of the question.

The main ground of the demurrer is, that "the order prayed for is without and beyond the jurisdiction of the court to make."

ALLEGATIONS OF PETITION.

The petition sets forth that the administrator had already expended certain moneys of the estate "for the purpose of maintaining possession of and title to certain lands situate in the Republic of Mexico," the grants or titles to which lands stood in the name of one Guillermo Andrade; but that "the said Andrade had expressly acknowledged and declared that the same were held by him merely in trust for the sole use and benefit of the said Thos. H. Blythe, and as his property," except certain undivided parts thereof, to which the said Andrade claimed to be entitled, as compensation for his services in and about the acquisition of said lands; that the decedent Blythe, for many years prior to and at the time of his death, was in the sole and undisputed possession of said lands, under the said grants and titles; and that the applicant, as administrator of the estate of Blythe, has, since his death, maintained and now holds possession of said lands; that the said grants and titles under which the said lands were acquired and held were upon the condition that said lands must be colonized to the extent of placing thereon two hundred families of settlers, fifty of which must be established before January 1, 1887, or the grants will become forfeited,—and to avert this forfeiture by placing the remainder of the fifty families (ten more) the administrator asks for leave to expend \$10,000 out of the assets of the estate.

PROCEEDINGS UPON FIRST PETITION.

The petitioner supports his application by reference to the orders of the court, pursuant to which he claims to have expended large sums of money in maintaining title to and

possession of these Mexican lands, and which orders, he claims, established the principle which should govern the court in considering this application. "Two judges (Coffey and Rearden) have separately considered the question involved in and the expenses of the care of the Mexican assets," says the counsel for the administrator (page 30, printed Points and Authorities, before referee), implying that this court, by its action heretofore, is committed now against the position of the demurrer. If the court, in the person of either or both of the judges named, erred in authorizing the administrator to deal with lands situate in a foreign jurisdiction, that is no reason why it should persist in error, after a more careful examination of the questions involved has exposed the true character of the issue. But an inspection of the record will show that the court was justified, by the case presented at the time, in what it did; and that its course has established no precedent for this application.

ALLEGATIONS OF FIRST PETITION.

On the 6th of June, 1885, the administrator filed a paper entitled: "Petition for directions to realize on and collect in foreign assets and to settle partnership affairs with G. Andrade and others"; in which he set forth that Blythe was interested, either legally or equitably, as an owner either in common or in partnership with Andrade and others, in certain lands situate in Mexico; and also as a shareholder in a certain Mexican incorporation; and that the said Mexican property and assets are sources of heavy outlay and offer no prospect of producing any income. "And no means exist [said the administrator applicant] by which they can be made to produce an income without the expenditure of such sums of money as would prove disastrous to the estate." And for many reasons therein stated the administrator verily believed it would be for the best interests of the whole estate to sell all of the Mexican assets and to bring the proceeds within this jurisdiction; and the applicant further declared that: "Even if the colonization can be affected at any moderate cost, the Mexican property cannot thereby be made to yield any income to the estate, for the colonists will occupy but a

small portion of the lands, and must, by the terms of the contract between the Mexican Government and the partnership of Blythe and Andrade, receive the plots to be occupied by them gratuitously or at a nominal price, and other inducements must be offered to them to cultivate and improve the lands appropriated to them, while the large quantity of lands still remaining must be cared for and protected at heavy annual outlays to this estate."

Further, the administrator applicant set forth that the only income producing property of the estate is situated in San Francisco, upon which there is a mortgage of \$375,000, for the payment of which he believed provision would have to be made before the question of succession could be settled; and he stated, as his opinion, that if the heavy outlays now necessary for the protection of the foreign and other unproductive assets of the estate should continue, it would be impossible to accumulate sufficient funds from the income to pay off said mortgage within the period to which it might reasonably be expected to remain without foreclosure; and for the purpose of paying off this mortgage, and also to settle the partnership affairs with Andrade and others, the administrator prayed the court for an order authorizing him to sell the "Mexican assets" and allowing him \$20,000 to carry out the project of sale.

Moved by the entreaty of this petition, the court (Rearden, J., temporarily presiding), on June 16, 1885, made an "Order directing administrator to realize upon foreign assets and for settlement of partnership affairs with Andrade et al." In that order the statement of facts hereinabove recited from the petition was adopted and found by the court as facts upon which it authorized the expedition to Mexico and to Europe, to make sale of these Mexican lands, the retention and care of which would necessitate the expenditure of such sums of money "as would prove disastrous to the estate," according to the administrator's petition.

The project of sale failed, for reasons not necessary to allude to here; and now we have an application to expend a certain sum of money in order to keep these lands—which sum, it is stated, will be all that is necessary for all time to come—the keeping of which, it was said, in June, 1885,

menaced with disaster the whole productive estate. In acting upon that petition, the court was actuated by a desire to forefend disaster, and did not think it was inviting it, or establishing a precedent or a principle broader than the terms of the petition, or the rigid limitations of the order of June 16, 1885. But even if it were otherwise, the question now presented must be met and decided without regard to the assumed attitude of the court, when it granted appropriations urged thereto by considerations of urgent necessity, presented by the administrator, and at a time when the question now raised was not fully, if at all, presented—certainly not thoroughly investigated.

In the course of the arguments upon this and the former applications, authorities were cited in great abundance, and from many states, and from the United States supreme court, and from the English reports, but it was not necessary, in the opinion of the court, to go beyond the confines of California to find a foundation for the judgment which must be pronounced upon the demurrer; and appended hereto will be found extracts at length from our own reports, which seem to me sufficient to justify the conclusion arrived at upon this application.

All through this administration the administrator has been dealing directly with these lands, and treating them as if clothed with power over them as administrator. His present application and his former applications have been framed apparently upon the theory that he had the right to manage and dispose of these real assets, situated in a foreign jurisdiction, the same as if they were within the state of California. I have searched in vain for a single case upholding this view. Not one of the cases cited by counsel for the application refers to real assets, nor can the principles laid down in those cases be extended to the subject matter of this application. In the examination of the questions involved in this case, I have been aided by two articles upon "Foreign Administrators and Executors," published in the Albany Law Journal, volume 34, Nos. 14 and 15, pages 263-267 and 286-292.

These articles comprise a fair review of most of the American authorities (outside of California) upon the subject treated, and they are here referred to as an aid to investiga-

tion. I am satisfied that the administrator has proceeded upon a mistaken theory of his duty, and of the power of the court, in dealing with the Mexican assets, and that his notion of his liability to the heirs in this connection is erroneous. The administrator, in the brief of his counsel (page 31), asks: "Why should he not protect the Mexican assets if Mexico will let him? Is he not specially charged with the care of California lands, and authorized to make proper expenditure for the purpose? Why is he not chargeable with the care of the Mexican lands, and authorized to make proper expenditures for the purpose, if his powers are as great in Mexico as here?"

His powers are not as great in Mexico as here; as administrator he has no power there whatever over real property; the fact stands admitted here that neither in his personal capacity nor in his official character has he, nor can he take, title to those Mexican lands. While it is true, as claimed by the administrator, that he must include in his inventory all the estate which has come to his possession or knowledge (Code Civ. Proc., sec. 1443 et seq.; *Estate of Butler*, 38 N. Y. 397), it does not follow that he is bound to account for assets situate without the jurisdiction of the Court by which he was appointed (*Sherman v. Page*, 85 N. Y. 123). If the public administrator should go to Mexico, what office can he perform—what function would he possess? This court cannot endow him with any official character beyond the borders of this state, and when he appears elsewhere he is simply a citizen abroad without any representative faculty whatsoever. Where he has no power, he can have no duty. As an alien in Mexico he cannot hold the title to these lands, and the official relation that he holds to this estate cannot repair his personal disability. We are called upon to administer, under the laws of California, an estate situated in Mexico. It may be well here to quote, as apposite to this case, the concluding remarks of Mr. Justice Cope, in deciding *De la Guerra v. Packard*, 17 Cal. 183: "In our view of the rights and liabilities of the heirs under the Mexican system, we do not see upon what principle the estate was subjected to administration under our statute; and we are inclined to

the opinion that whatever has been done in this respect must be regarded as unauthorized and illegal."

But it is now claimed by counsel that we are dealing with an executory contract which this court may authorize the administrator to fulfill. This argument in no manner applies to the question raised by the demurrer to the petition of the administrator, nor does it agree with the position assumed up to this time throughout the controversy by the administrator. (See his printed brief, *passim*, especially page 12, as to the duty of the administrator "in respect of Mexican assets.")

This is either a partnership interest or a trust (see administrator's petitions); it cannot be the same as an executory contract; it is a personal asset or a real asset—which?

The paper itself—the contract—is not an asset; it is the thing itself represented by that paper, i, e., the lands in Mexico, with which the court deals. This court, sitting in probate, has no chancery side, as the supreme court of the state has more than once decided since the adoption of the constitution of 1879; it deals only with administrations, and cannot assume jurisdiction, except the object upon which it is to operate is before it. If Blythe died, leaving no estate at all within the territorial jurisdiction of California, and no estate but these "Mexican assets," it would hardly be claimed that by virtue of that "executory contract," administration might be had in California, and the terms of the contract enforced through the process of the probate department of the superior court. No obligation, in any event, rests upon the administrator to go into Mexico, any more than to go into India or Australia, or any other remote country, to deal with real estate, and, consequently, no liability can attach to his not doing so. So far as he makes any point on the statute of this state, enlarging his liability, he errs, in my judgment. Section 1443, Code of Civil Procedure (to which he refers in this connection), relates only to estate actually or in legal contemplation within this state; this has been the uniform practical construction of the courts, and is shown to be correct by a reading of all the sections of the Code of Civil Procedure bearing upon this subject: Code Civ. Proc., secs. 1449, 1452, 1516, 1581.

While I have paid due respect to the foreign authorities upon the issue here presented, I think the question may readily rest upon the decisions of the supreme court of California, from 12 Cal. 207, to 66 Cal. 432. See the extracts subjoined to this opinion.

Demurrer sustained.

APPENDIX.

By the COURT. In the Matter of the Estate of Knight, 12 Cal. 207, 73 Am. Dec. 531, Mr. Justice Baldwin, delivering the opinion of the court, said: "This is unquestionably a hard case on the administrator, for he seems to have acted in good faith. But we cannot relax or set aside the rules of law to suit the exigencies of particular cases or relieve individual instances of hardship. The statutes of this state do not allow an administrator to pay even the debts due by an intestate, except in a particular way. Certainly they do not allow him to pay money not due by an intestate, upon the idea that the payment may be beneficial to the estate.

"He is to take care of, manage and preserve the estate committed to him; but this does not mean that he is, at discretion, to pay off all encumbrances resting on the property, upon the notion that the property may be increased in value, and thereby a speculation may be made for the estate.

"If this were so, an administrator might consume all the assets of the estate in clearing the title to a portion of the property, and then the property may turn out to be valueless or worth but little. If a case should arise in which a great sacrifice would ensue unless money were paid to discharge an encumbrance, it is not impossible that a court of chancery might order the expenditure of the money needed to remove such encumbrance.

"The rule of equity is that a trustee has a right, in questions of responsibility and difficulty, to seek the direction of a court of chancery touching his conduct in the trust, and that the decree of the court is a protection to him. But if he undertakes to go beyond the strict line of duty, as the law defines it, he acts on his own responsibility, and while he can receive no profit from a successful issue of his in-

vestments, he must bear the loss of a failure. It would be a most dangerous precedent to hold that an administrator may speculate with the funds of an estate, or pay charges not allowed by law, though solely with the view of benefiting the estate, and then throw the loss upon the estate, and assign his good intentions as a defense to the injurious consequences of his act.

"The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; but he cannot advance money to remove encumbrances, unless the intestate was bound to pay the money. If he takes the responsibility of improving the estate or bettering the title in this way, it must be at his own risk. The loss cannot be visited upon the heirs, who gave him no authority to cause it. Nor can he ask legal protection when he has himself, though with the best motives, gone beyond the provisions of the law."

In the case of *Smith v. Walker et al.*, 38 Cal. 385, 99 Am, Dec. 415, the substance of the opinion of the court, by Mr. Chief Justice Sawyer, is correctly stated in the syllabus, in these words: "The surviving member of a partnership owning real property is something more than a mere tenant in common with a representative of the estate of a deceased partner. He is the trustee for the purpose of winding up the affairs of the firm, and is accountable for the value of the use and occupation of the landed estate of a partnership. The surviving partner is bound to account and pay over to the administrator of the deceased partner all the profits of the realty, as well as that of the personal property, that rightfully belongs to the estate, notwithstanding he may have purchased the interests of the heirs in the estate or the community interests of the surviving wife of the deceased partner; and it is for the probate court to distribute the estate to the parties entitled."

In the course of the argument of the counsel for the appellants, in *Tompkins v. Weeks*, 26 Cal. 52, Eugene Casserly said: "There is probably no case in which an executor can lawfully make a purchase of property, except where the

transaction is necessary for the protection of the estate, and at the same time involves no expenditure or liability; as where, upon a foreclosure sale, the executor holding the first or only mortgage of property about to be sold for a sum far below its value, and below the amount due on the mortgage, he bids it in for the benefit of the estate, and holds it precisely as he had held the mortgage. That was the case in *Clark v. Clark*, 8 Paige, 152, 157, 158."

That is the case referred to by the counsel for the public administrator, on page 26 of his Points and Authorities before the referee.

In the case of *Tompkins* (administrator of the estate of Miner) against *Weeks*, 26 Cal. 66, after quoting with approval the *Estate of Knight*, 12 Cal. 207, 73 Am. Dec. 531, Mr. Justice Sawyer for the court, in the course of his opinion, said:

"The court had no jurisdiction to make the order, and the administrator no authority to execute it. The partnership was dissolved by the decease of Miner.

"The partnership property are assets of the firm, and subject to the exclusive management and control of the surviving partner. It was not assets of the estate in the hands of the administrator. Only the share of the deceased in the residuum of the partnership assets, after the affairs of the partnership should be wound up and the debts paid, would be assets of the estate in the hands of the administrator.

"The administrator had no authority to intermeddle at all with the partnership affairs, except so far as he was entitled to call upon the surviving partner to proceed and close up the partnership affairs, and to account to him for the share of the surplus belonging to the estate. The authority of the administrator only extended to settling up the affairs of the estate, paying the debts and distributing the remainder, under the direction of the probate court, to the parties interested."

In the case of *Brenham v. Story*, 39 Cal. 179, at page 186, Mr. Justice Temple, delivering the opinion of the court, said: "The duty of an administrator is to take charge of the estate for the purpose of settling the claims, and, when they have been satisfied, it is his duty to pass it over to the heir,

whose absolute property it then becomes. To allow the administrator to sell, to promote the interests of those entitled to the estate, would be to pass beyond the proper functions of an administrator, and constitute him the forced agent of the living for the management of their estate."

In speaking of the act of the legislature, under discussion in that case, the judge further said (page 188): "That it was clearly an attempt to use the office of the administrator to speculate with the estate of the heirs, and not to administer the estate of the deceased. This is plainly beyond the power of the administrator as such. It is no part of his duty or authority to manage the estate for the benefit of the estate, or of the heirs. So far as they are concerned, it is his duty, simply, to preserve the estate until distribution. He cannot make investments for them, or satisfy adverse claims, or sell because the estate will profit by it: *Estate of E. Knight*, 12 Cal. 207, 73 Am. Dec. 531."

The case of *De la Guerra v. Packard*, 17 Cal. 183, 193, was a case where one Lataillade, a decedent under the Mexican law, left no will, and one Jose De la Guerra, who was the legal representative of the decedent, took possession of decedent's estate, and attempted to administer the same without authority, paying out large sums in excess of his receipts.

In 1857 administration was obtained in the probate court; defendant Packard ultimately obtaining letters. De la Guerra having died, his executors sued to recover from the administrator of Lataillade for the excess of disbursements made by De la Guerra in the matter of the Lataillade estate. The court held that any claim by De la Guerra's executors should have been brought against Lataillade's heirs directly, as having been made for their benefit, and not against the estate.

Mr. Justice Cope, in his opinion, says (page 193):

"Our conclusion is that, by the rules of the common law, the plaintiffs are not entitled to recover, and we are satisfied that whatever may be their rights under the laws or jurisprudence of Mexico, they have mistaken their remedy.

"Under the Mexican system their testator stood in the position of a voluntary agent, and represented the persons of the heirs, and not the estate.

"The heirs succeeded immediately to the estate, and became personally responsible for the debts of the deceased. The disbursements and payments of these debts were on behalf of the heirs, and in discharge of their personal liability. If any claim exists for the amount of these disbursements, it is against the heirs, and not against the estate.

"Indeed, in our view of the rights and liabilities of the heirs under the Mexican system, we do not see upon what principle the estate was subjected to administration under our statute, and we are inclined to the opinion that whatever has been done in this respect must be regarded as unauthorized and illegal."

In *Rolfson v. Cannon*, 1 West Coast Rep. 696, 3 Utah, 232, 2 Pac. 205, Mr. Justice Twiss, of the supreme court of Utah, says:

"It is the duty of an administrator to administer an estate, to take care of and preserve it, to collect all the moneys and to dispose of the balance in his hands as required by law.

"Having done this, the estate is administered and he entitled to his discharge, and the heirs are entitled, in due form of law, to their especial portion of the estate. The administrators were not authorized to erect the dwelling-house with the funds of the estate, or a house to be occupied by one of them, or for any other use or purpose. Neither could they involve the estate by borrowing money, with which to pay for the material or for the labor performed in the construction of such houses. They did not have authority to charge the estate with the repayment of the money borrowed by them for that purpose. The borrowing of this money was not a contract between Heath as administrator and the appellant, although it may have been a contract between him individually and the appellant. The facts that the estate of the deceased was improved, and the value of it enhanced by the erection of the houses, and that the money was borrowed for the purpose of, in part, paying for the material and labor necessary for the construction of the same, do not make the estate liable for the debts thus contracted. An administrator is not permitted to use the funds of an estate, or to borrow money upon its credit or liability for such speculative purposes."

While an **Executor or Administrator** has no Authority to pursue assets of the estate by legal process in a foreign jurisdiction, he nevertheless owes a duty to collect them to the extent of his ability to do so, and the court should compel him to account for his failure to perform this duty. There is no doubt of his authority to receive the voluntary payment of debts in a foreign jurisdiction, at least if no ancillary administration has been granted there. He must account in the domiciliary administration for the money received, and the payment will discharge the indebtedness even as against an ancillary administrator subsequently appointed: *Estate of Ortiz*, 86 Cal. 306, 21 Am. St. Rep. 44, 24 Pac. 1034; *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 480, 24 Pac. 855, 26 Pac. 897; *Joy v. Elton*, 9 N. D. 428, 83 N. W. 875; note in 45 Am. St. Rep. 664.

ESTATE OF ANNA HERZO, DECEASED.

[Decided April 30, 1902.]

Inheritance Tax—Bequest for Masses.—Bequests for masses are for charitable purposes, and therefore exempt from the operation of the collateral inheritance tax act of 1899.

Inheritance Tax—Bequest for Altar.—A bequest to beautify the altar of a church is for a charitable purpose, and therefore not subject to the collateral inheritance tax act of 1899.

John J. O'Toole, for certain legatees.

A. Heynemann and A. Comte, Jr., for executors.

Anna Herzo bequeathed four legacies to certain priests in Dalmatia, each legacy being bequeathed to "the governing priest or pastor" of the church (naming it). Three of these legacies, to quote from the language of the will of said deceased, are "to the governing priest or pastor of the church known as (naming church), to be invested by him and the income thereof paid to the authorities of said church, for the celebration of masses for the repose of my soul, and the repose of my deceased husband and his and my relatives."

The fourth legacy is "to the governing priest or pastor of the church called 'Madonna del Campo Grando,' to be ap-

plied in ornamenting and beautifying the altar in said church, etc."

The act commonly known as "the Collateral Inheritance Act of 1899" exempts from taxation legacies or bequests to any person, society, corporation or association in trust for, or to be devoted to, any charitable, benevolent, educational or public purpose: Cal. Gen. Laws, 1899 ed., p. 1192.

If the legacies bequeathed by deceased for "masses for the repose of her soul," etc., are for charitable purposes, they are, of course, exempt from the tax under the act.

Masses are not bought, any amount or anything given to the priest for their celebration is given as a gratuity, or as an alms-offering. That the giving of alms is a charity is a proposition that does not need authority to support it.

The courts of the United States all agree that a bequest "for masses for the repose of the soul of testator and his relatives" is a charitable bequest.

In *Kerrigan v. Tabb* (N. J.), 39 Atl. 701, the court says: "A use of this kind (a bequest for masses) based on the doctrines and practices of a Christian church, and which does not impair any of the rights or obligations arising under the authority of the state, its constitution or laws, must be considered a religious use."

A bequest for the support of religion or for a religious use is certainly for a charitable and benevolent purpose, and clearly within the exemption of the act.

In *Alden v. St. Peter's Parish*, 158 Ill. 637, 42 N. E. 392, 30 L. R. A. 232, the learned judge, in expressing the opinion of the court, said: "A gift for the support of churches or to pay the expense of any religious doctrine comes within the equity, and therefore within the spirit of the statute, as a gift for a charitable use."

In *Andrews v. Andrews*, 110 Ill. 223, it was held that a devise of land to a church to sustain the preaching of the gospel, and to use the income of the property to pay any balance of salary due the minister was a public charity.

If to sustain the preaching of the gospel is a charity, so the practice of the rites of any religion (which rites are not contrary to law) is a charity. The celebration of

masses is one of the rites and ceremonials of the Catholic church.

As was said in *Alden v. St. Peter's Parish*, "a gift for the support of churches or to pay the expense of any religious doctrine comes within the statute." While the money bequeathed for masses is not offered or received as pay for the masses, it is accepted by the priest and used by him for his own support and for the support of his church, and as such is undoubtedly a charity.

In *Re Schouler*, 134 Mass. 426, the court said: "Masses are religious ceremonials or observances of the church of which she (the testatrix) was a member, and come within the religious and pious uses which are upheld as public charities."

The same doctrine is announced in *Jackson v. Phillips*, 14 Allen, 539.

In *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241, 49 N. E. 529, 40 L. R. A. 730, the court said: "It cannot be denied that bequests for the general advancement of the Roman Catholic religion, the support of its forms of worship, or the benefit of its clergy, are charitable equally with those for the support or promotion of other forms of religious belief or worship"; and in commenting further on the same matter it said: "The bequest (for masses) is not only for an act of religious worship, but also for the support of the clergy; although the money is not regarded as a purchase of the masses, yet it is retained by the clergy, and of course aids in the maintenance of the priesthood."

In *Rhymes' Appeal*, 93 Pa. 145, 39 Am. Rep. 736, it was contended that a bequest "for masses for the repose of testator's soul" was void, because the will was not executed prior to thirty days before death of testator, as was required by the act of 1855 (which is similar to section 1313 of the California Civil Code). The court upheld the contention, declaring that the bequest was a charitable one, and therefore must fail by reason of the will not being executed prior to thirty days before testator's death.

And in view of the decisions of the highest court of our sister states, the court must conclude that the legacies be-

queathed by Mrs. Herzo for masses are for charitable purposes, and therefore exempt from the tax.

As to the fourth legacy, given "to beautify the altar," the court must come to a like conclusion; it is also exempt from the tax, for it is for a charitable and benevolent purpose.

In *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, the court held that "a bequest to a certain church (eo nomine) is a charitable bequest, as being presumably intended for building, repairing and beautifying a place of public worship." In the case at bar, the bequest is expressly given for "beautifying" a place of public worship.

This court in construing the term "charity" in *Estate of Emeric*, held that a bequest "for repairing and restoring the old Roman Catholic Church in the town of Neoules" was a charitable bequest. The court can see no difference, so far as principle is concerned, between repairing and restoring and beautifying, and hence must conclude that the legacy in question here is also for a charitable purpose, and is therefore exempt from the tax in question.

ESTATE OF M. O'BRIEN, DECEASED.

[No. 19,824; decided May 8, 1899.]

Will—Contest on Ground of Forgery.—The probate of a will is permitted to stand in this case as against a charge that the instrument is a forgery, the charge being based on the theory, which finds some support in the evidence, that the testator was not at the place where the will was executed at the time of its execution.

T. E. Pawlicki and P. J. Muller, for contestant.

F. J. Kierce (Kierce, Sullivan & Gillogley), for proponent and respondent.

The will herein was admitted to probate May 27, 1898, a contest instituted prior to probate having been denied

on the same day. That pre-probate contest was by one Mary McGowan, a sister of deceased, and the grounds stated being unsoundness of mind, nonexecution and undue influence.

This post-probate contest was filed October 3, 1898, by one Margaret Durkin, another sister of decedent testator, and is confined to a charge of forgery alleged to have been perpetrated by one James C. O'Brien, a brother of decedent, on the third day of March, 1898, several months after the date of the instrument, which was October 7, 1897, the day of this date being Thursday. The date of the death of decedent was March 3, 1898. It is contended by counsel for contestants that the will was never executed, and that according to the proof it is impossible that it could have been executed on Thursday, October 7, 1897, for the evidence shows that on that day the decedent, M. O'Brien, was at a party given in honor of one Tom Parker at the O'Neill's place, on Point Lobos avenue, and he did not leave there until "the last car home," near to 12 o'clock midnight; the ledger of decedent used in his business and in his handwriting is adduced to corroborate the oral testimony on this point, page 47 of this little red book or ledger containing a pencil entry seeming to signify that on "Oct. 7," 1897, he delivered a quantity of cigars to the witness O'Neill at Point Lobos and Fifth avenues. It is contended further that the evidence establishes that the instrument was concocted and written after M. O'Brien's death, and that it was fabricated and forged on the 3d of March, 1898, as the result of a conspiracy by the parties who originally procured its probate. In support of this contention counsel for contestants allude to what they term the strange circumstances surrounding the alleged execution of this instrument and the improbability of the truth of the testimony of the witnesses for the proponent, also the dissimilarity of the signature "M. O'Brien" appended to the will and the admitted signatures to other papers, and counsel claim that this discrepant element is discernible, for although, of course, a forger does not fortuitously simulate a script, and, therefore, as the result of study some simi-

larity must appear, still there will remain always some indicia of iniquity.

Particular stress is laid by counsel for contestants upon the item of evidence furnished by the entry in "the little red book" or ledger, page 47, and, in answer to the intimation that the entry shows signs of having been tampered with, counsel insist that it is the height of absurdity to insinuate that contestants changed the item so as to show that decedent was at the O'Neills' house on October 7, 1897, the date of the will. The important nature of this item is dwelt upon by counsel because of its corroborative character coming from an unimpugnable source, the indubitable hand of decedent. It is a fact that the subscribing witnesses testified that the will was executed near to 8 o'clock in the evening of October 7, 1897, and it is a fact that O'Neill and his wife testified that he was at their place on that evening, and M. O'Brien, the decedent, came to their place to deliver certain cigars—two hundred and fifty—and the O'Neills induced him to remain to the party given in their house to Tom Parker, and that O'Brien did not leave until time to take the last car to the Potrero, near to midnight, and it is claimed that the entry on page 47 of the ledger written by the decedent himself confirms this testimony of the O'Neills. In addition to this argument, counsel raises the point upon the contents of the document: Motive of decedent to prefer Katie O'Brien to others, and it is argued that there was no reason in fact for any such preference; that there was more reason to prefer the others, and the reason assigned in the alleged will has no adequate foundation.

The will is as follows:

"South San Francisco, October 7, 1897.

"To all whom it may concern if any thing happens to me, I want to give everything I own to my sister, Katie O'Brien for she was always so kind and good to me.

"M. O'BRIEN,

"1863 15th Ave.

"MAGGIE DULLEA O'BRIEN.

"PATRICK O'BRIEN."

The reason for contesting the will is asserted to be not a matter of pecuniary interest, but one of principle, for the statutory share of each is too small to justify a factious contest, but the contestant believes the alleged will to be false and forged, and is, therefore, concerned in conscience to thwart the consummation of a conspiracy to palm off upon the court the fruit of fraud.

The only perplexity in this case arises upon the testimony as to the whereabouts of the decedent, M. O'Brien, at the time of the alleged execution of the instrument in probate, Thursday, October 7, 1897. Notwithstanding his nationality, he could not have been in two places at once; from Point Lobos to the Potrero is a far cry at night, and if M. O'Brien was from sundown to midnight enjoying the hospitality of the O'Neills, he could not have been simultaneously in the seclusion of his own home, and consequently there was either a mistake in the date of the probated paper or it is the expression of mendacious machinators. This is the whole case of plaintiff, and upon her rests the burden of proof. She is bound to make out her case by a preponderance of proof. The swearing is stout and strong on both sides and yet the pecuniary temptation to perjury, only a few hundred dollars in value, is scarcely sufficient to justify or extenuate a fracture of the eighth commandment: Ex. xx, 16; Deut. v, 20. But it is frequently found that other motives than those merely monetary operate to pervert the moral sense, and that malice, hatred and envy, three distinct passions of the mind, cooperate to corrupt the heart and induce false swearing. It is charitable, however, to seek for worthier motives in the liability to error of perception or recollection and to attribute to mistake rather than to malice, or other evil design, the differences in the statements of witnesses. It is possible that every witness in this case is truthful in intent, and the court should be slow to pronounce any one false in purpose. There may have been a mistake in the date of the instrument in probate, and yet the main facts might remain established; the date may be correct and the entry in the ledger accurate, and still decedent may have delivered the two hundred and fifty cigars to the O'Neills on

that day in time to return home early enough to execute the will at 8 o'clock. In this view the O'Neills may be honestly at fault in their recollection of the fact as to the particular party at which decedent was present. This I take to be the explanation of the matter. I cannot come to the conclusion, after full deliberation, that this probated paper is a post-mortem fabrication on the part of James C. O'Brien or any other person. The testimony for contestant, although plausible in presentation by counsel, is not sufficiently strong to overcome proponent's proof. There is nothing unnatural or unreasonable in the disposition of his property by the testator; the reason assigned is dutiful and just, and cannot support intrinsically a doubt as to its validity or genuineness. As to the imputed dissimilarities between the subscribed name "M. O'Brien" on the instrument and the acknowledged or admitted signatures of decedent, they disappear under examination and comparison. Strongly and sincerely as counsel for contestants have presented their case to the contrary, I conclude that the signature is genuine and that the probate of the will should stand.

ESTATE OF JULIA J. FITZGERALD, DECEASED.

[No. 91,287; decided May 6, 1899.]

Word "Heirs" not Technically Construed in Will.—The word "heirs" in a testamentary instrument will not be construed technically, if the intention of the testator as disclosed by the context will thereby be defeated and a portion of the will rendered inoperative.

Remainders—When not Based on Double Contingency.—Under a will which reads: "I give to my daughter all the property of which I die seised, remainder to the heirs of her body in fee simple, but in the event of her death without surviving heirs of her body, I direct said remainder to be distributed to my heirs then surviving according to the law of descent at the date of my daughter's death," the remainders cannot be attacked as invalid on the ground that the contingencies on which they depend are double or constitute a possibility upon a possibility; they are alternate, and respectively depend on only one contingency.

Jones and O'Donnell, for petitioner.

John B. Carson, for certain heirs.

Augustus Tilden, for the executor.

THE FACTS.

Petitioner is the only child and heir at law of the deceased. She had not, at the time of the death of deceased, and has not, any heirs of her body.

Deceased left a will, of which the part pertinent to this inquiry is as follows:

"I give, devise and bequeath unto my beloved daughter, Anna Josephine Fitzgerald (Lee), for her natural life, all the real and personal property of which I die seised and possessed, remainder to the heirs of the body of said Anna Josephine Fitzgerald in fee simple, but in the event of her death without surviving heirs of her body, I direct that said remainder be distributed to my heirs then surviving according to the law of descent and distribution in force in the State of California at the date of my said daughter's death."

By her petition for partial distribution, which affects one of the two parcels of real property belonging to the estate, petitioner asks the court to adjudge that the foregoing provision is in effect an absolute devise, and, to that end, to hold that the remainders therein created are void.

The executor and the parties represented by Mr. Carson insist upon the entire validity of the will.

SUMMARY OF PETITIONER'S ARGUMENTS.

Petitioner's arguments may be summarized as follows:

1. The second remainder is void because it is in effect a devise to petitioner for life, remainder to petitioner in fee, which is tantamount to the disposition in the first instance of the absolute fee.

2. The first remainder is void because it contains a provision in restraint of marriage.

3. Both remainders are void because of the "double contingency," or "possibility upon a possibility."

THE FIRST POINT

involves the construction of the words "my heirs then surviving," as used in the foregoing provision. Petitioner contends that no such remaindermen do or can exist, for the reason that, she being testatrix's heir, no one of remoter degree of kinship can be her heir.

It is impossible to deny the force of this construction, provided the word "heirs" be technically construed and the testatrix's manifest intention ignored, for it is manifest from the context that by the word "heirs" she meant collateral relatives. So to hold will be to render the paragraph wholly inoperative, contrary to the provisions of Civil Code, section 1325, which directs that "the words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative."

A TECHNICAL CONSTRUCTION.

From the earliest times courts have refused to approve the construction contended for by petitioner. At common law, when a remainder was limited by deed to the heirs of A (A being in being), the maxim, "*Nemo haeres viventis est*," operated to render the remainder void. When the same remainder was limited by will, the maxim was ignored in favor of the manifest intention of the testator. So when land was deeded to A for life, remainder to the heirs female of his body, and he died leaving a son and a daughter, the remainder failed, because, as the son was the heir, the daughter could not answer to the description of both female *and* heir. Contrary, when the limitation was by will, which was a case parallel with the one at bar: Coke's Littleton, 24 b.

RIGID CONSTRUCTION NOT WARRANTED.

Even were the court inclined to greater rigidity of construction than that laid down at so early a date, and thence steadfastly adhered to, the statute would not warrant it.

Technical words in a will are to be taken in their technical sense, unless the contest clearly indicates a contrary inten-

tion: Civ. Code, sec. 1327. Technical words are not necessary to give effect to any species of disposition by will: Civ. Code, sec. 1328.

"When applying a will it is found that no person exactly answers the description, mistakes must be corrected, if the error appears from the context of the will:" Civ. Code, sec. 1340.

Accordingly "money" has been held to include "real property": Estate of Miller, 48 Cal. 165, 22 Am. Rep. 422. And, more in point, "children" has been held to designate "grandchildren": Estate of Schedel, 73 Cal. 594, 15 Pac. 297; Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513. Similarly, in other states, "bequeath" held to mean "devise": Dow v. Dow, 36 Me. 216; Estate of Fetrow, 58 Pa. 427. And where a reservation would have been void because repugnant to estate devised, construed, an executory devise, to effectuate the manifest intention of the testator: Homer v. Sheldon, 2 Met. 194.

Counsel for petitioner do not question that the intention of testatrix was other than the word "heirs," technically construed, implies, and I am satisfied that such intent, when so clearly disclosed by the context, should, against the alternative of total intestacy as to the second remainder, be permitted to prevail.

THE SECOND POINT

raises the question of the validity of the first remainder, counsel's contention being that it is void because in restraint of marriage. Say they: "We claim that because petitioner gets the life estate and the second remainder under the will if she marries and has issue surviving her, but if she does not marry and have issue, then she must necessarily, as devisee and heir, get the whole fee, therefore, the fact of marriage and having issue is in the nature of a penalty, because by so doing the estate goes to somebody else."

As this contention assumes the invalidity of the second remainder, contrary to the views above expressed, it must be overruled. But were the second remainder void, it would seem that the contemplation of the estate falling to strangers, instead of to her own issue, would hasten any properly con-

situated person to the altar rather than frighten her therefrom.

THE THIRD POINT

is aimed at the validity of both remainders, on the ground that the contingencies on which they depend are "double," or constitute a "possibility upon a possibility."

The feature of the death of petitioner may be eliminated, because it is not a "contingency"; it marks the certain termination of the particular estate and vesting of the remainder.

The contingency on which the first remainder is limited is the existence of heirs of petitioner's body at the time of her death.

The contingency on which the second remainder is limited is the existence of collateral relatives ("my heirs then surviving") of the testatrix, who shall be testatrix's descendants under canons of descent prevailing at petitioner's death, and who shall survive petitioner.

Petitioner claims duplicity in this: the petitioner's death, without issue, is one contingency, whilst the probability or possibility that the law of descent at her death may be different from what it was at testatrix's death, is a second contingency.

THE VIEW TAKEN BY THE COURT.

Each remainder stands alone, and should be construed without reference to the other, as though it alone existed, for the remainders are alternate. Counsel have fallen into the error of confounding the contingency peculiar to one with the contingency peculiar to the other, and of applying both contingencies to both remainders and to each indiscriminately. The court takes the view that the first contingency marks the vesting of the first remainder; the second contingency marks the vesting of the second remainder. The two remainders depend upon contingencies "entirely independent of each other," to use the language of counsel for petitioner, but they respectively depend only upon one contingency—the survival of a person competent to take.

CONFORMABLE WITH COMMON LAW AND CODE.

This manner of disposing of future interests is conformable with the common law and with the provisions of the code.

The statutory rule is, Civil Code, section 767: "A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created in the same."

This, and other sections not necessary to be here cited, are simply declaratory of the common law, although they have the effect of abolishing executory devises, *eo nomine*, and of clothing remainders with qualities formerly peculiar to executory devises.

ALTERNATIVE REMAINDERS.

And concerning alternative remainders, the Civil Code, section 696, provides: "Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it and take effect accordingly."

In the present case, should "the first in order (the remainder to Anna's issue) fail to vest," where will the "next in succession" vest? Not necessarily in the persons who, had petitioner predeceased testatrix, would, under section 1386 of the Civil Code, have been testatrix's heirs; but, necessarily, in the persons who, under that or any superseding section of law in existence at the time of Anna's death, shall be the "heirs then surviving" of testatrix.

NO DIFFICULTY IN THE DETERMINATION.

Applying this test, there will be no difficulty in determining who, as alternating beneficiary with Anna's issue, should succeed to the remainder.

The executor's counsel claim that, even though the remainders be void, the life estate is not thereby enlarged, as a clear devise of an estate for life cannot be defeated by an uncertainty as to what may come after the death of the life-terminer. It is not necessary for the court to decide this point, inasmuch as it has taken the view that the remainders are valid.

The demurrer to the petition for partial distribution should be sustained, and it is so ordered.

IN THE MATTER OF THE ESTATE OF WINFIELD S. JONES,
DECEASED.

[Decided December 29, 1904.]

Substitutional Legacies.—Where a Decedent Leaves Two Testamentary Instruments which are admitted to probate as his last will, in each of which he bequeaths to several persons, respectively, the same amounts, and denominating each instrument as his last will, such language constitutes intrinsic evidence of the testator's intention, and the legacies in the latter instrument are substitutional for those contained in the former.

Charities—One-third of Estate—Conflict of Laws.—Where a testator leaves real and personal property in California and real property in other states, and devises one-third of his estate to charities, the courts in this state cannot take into account the property situated beyond their jurisdiction in determining what one-third of the estate is.

Charities—One-third of Estate—How Determined.—The word "estate," as employed in section 1313 of the Civil Code, means estate in California. The one-third of the estate which may be given to charity is one-third of the distributable assets of the estate.

Residuary Clauses.—Where Two Testamentary Instruments are Admitted to Probate as the last will of the testator, each instrument in itself being complete as a will and each containing a residuary clause, the two clauses are inconsistent and the latter clause prevails, unless it fails in whole or in part, in which event the residuary clause of the prior will operates.

Residuary Clauses—Charities.—In this Case it is Held that the Residuary legatees under a former will take the residuum of the estate, which is bequeathed to charities by the residuary clause of a latter will, but which they are unable to take by virtue of the restrictions imposed by section 1313 of the Civil Code.

Wills—Several Instruments.—The Rule of Construction is substantially the same where there are several wills to be harmonized, as where there are several clauses in the same will and codicils.

Wills—Transposition of Order of Bequests.—Where it appears from the entire language of a will that the testator's intention will be rendered clearer by transposing the order of the bequests, the court will construe the bequests as though the testator had written them in the transposed order.

Wills—Several Instruments.—Two testamentary instruments are to be taken and construed together as one instrument.

Wills.—All the Parts of a Will are to be Construed in relation to each other, so as, if possible, to form one consistent whole; but where several parts are wholly irreconcilable, the latter must prevail.

Wills.—A Prior Will Remains Effectual so Far as Consistent with the provisions of the subsequent will.

Charities.—The Excess of an Estate All Over and Above the One-third to charities goes to the residuary legatee or devisee, preferably to the next of kin or heirs at law, according to the provisions of section 1313 of the Civil Code.

Intestacy.—The Very Fact of Making a Will Raises a Very Strong Presumption against any expectation on the part of the testator of leaving any portion of his estate beyond the operation of his will.

Intestacy.—Intestacy is not Favored in Law.—The law prefers a construction of a will which will prevent a partial intestacy to one which will permit such result.

Smith & Pringle, for executors.

P. J. Muller, representing Page, McCutchen & Knight, for Mary and Virginia B. Jones, sisters of decedent, and residuary legatees under the first will.

Garber, Creswell & Garber, for the First National Bank of Bakersfield, as assignee of W. Brooks Jones, one of the legatees under both wills.

Elliott McAllister, for Maria Kip Orphanage.

Wilson & Wilson, for Bishop Armitage Orphanage.

E. H. Rixford, for Protestant Episcopal Old Ladies' Home.

E. H. Rixford, and William Mintzer, for Grace Church.

COFFEY, J. Winfield S. Jones died leaving two wills. The first will was dated July 15, 1896. The codicil added thereto was dated October 7, 1899. The second will was dated August 31, 1901. These three testamentary instruments were admitted to probate as the last will of the deceased: Civ. Code, sec. 1320.

By the first instrument there is bequeathed to S. L. Abbot the third, the sum of one hundred (100) dollars; to W. Brooks Jones, a nephew of deceased, the sum of five thousand (5,000) dollars; and to T. Skelton Jones, an uncle, the sum of five thousand (5,000) dollars. In addition, there are bequests to other persons. Executors are appointed, and the

residue of the estate is devised and bequeathed to Mary Jones and Virginia B. Jones, the testator's surviving sisters, thus disposing of his entire estate.

By the codicil the sum of one thousand (1,000) dollars is bequeathed to the rector, wardens and vestry of Grace church.

The second will which, in effect, likewise disposes of the entire estate of the testator, ends with the words "This is my last will." It contains bequests to a number of persons, including the persons aforementioned, namely, S. L. Abbot the third, W. Brooks Jones, and T. Skelton Jones, to each of whom there is bequeathed the sums respectively bequeathed to them by the first will; the remainder is given and devised to charities. No executors are appointed in this will.

The estate of the deceased consisted of real and personal property situate in California, aggregating in value a sum in excess of one hundred thousand (100,000) dollars. Also real property situate in Washington, D. C., and an interest in the family farm situate in Fairfax county, Virginia, which are specifically devised by the second will to the testator's sisters. These properties have never formed part of the estate within the jurisdiction of this court, and were not inventoried and appraised.

The bequests to charities, by the residuary clause of the second will, collectively exceed one-third of the estate.

The questions of law involved and presented to the court for consideration are as follows:

First. Are the bequests to S. L. Abbot the third of one hundred (100) dollars, to W. Brooks Jones of five thousand (5,000) dollars, and to T. Skelton Jones of five thousand (5,000) dollars, accumulative or substitutional? It is contended by the sisters of the deceased that they are substitutional; the assignee of W. Brooks Jones claims that they are cumulative.

Second. Are the charities entitled to one-third of the property situate in Washington and Virginia, and if so, is that third to be paid them out of California assets? The charities contend that they are entitled to one-third of the assets of the estate wherever situate, payable out of the California estate. The sisters oppose this contention.

Third. Are the sisters of deceased entitled to the residue of the estate under the residuary clause of the first will, exclusive of the next of kin or heirs of the testator? The sisters claim that they are. The assignee of W. Brooks Jones is opposed to this view.

These questions will be dealt with in their order.

First, therefore, let us consider whether the bequests to S. L. Abbot the third, W. Brooks Jones and T. Skelton Jones in the second will are substitutional or accumulative.

It is a well-known rule of law that if two legacies are given to the same person, and the intent is that the legatee shall have both, the legacies are said to be cumulative; if the latter is only a repetition of the former, it is said to be substitutional. In ascertaining the intent, the following rules of construction have been adopted:

1. If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the codicil, the legatee can claim the benefit of only one legacy, because the same identical thing can only be given once.

2. Legacies of quantity bequeathed by one and the same instrument, if of unequal amounts, are cumulative; if equal, the second is considered a repetition or substitution of the first, and the legatee is entitled to one only.

3. Legacies of quantity, given by different testamentary instruments, as by will and codicil, to the same person, are *prima facie* cumulative, whether of equal or unequal amounts, unless the amounts are the same and expressed to be given with the same motive, or it appears from intrinsic evidence that the second instrument was intended as a mere substitution for the first. If either of these latter circumstances occurs, the second legacy is substitutional: See 13 Am. & Eng. Ency. of Law, p. 54 et seq.

It is only necessary for the present to consider the third of these rules.

It appears intrinsically from the instruments themselves that the bequests in the second will to the persons aforesaid are substitutional; the very language contained in the second will is conclusive upon that point. The second will ends with the words "This is my last will." What more forcible mode of expression could the testator have employed to indicate

that the legacies to S. L. Abbot the third, W. Brooks Jones and T. Skelton Jones contained in the second will were to be a substitution for the legacies to them of the same amounts, respectively, contained in the first will?

And thus the courts have held that the form of the instrument by which the second legacy is given may show that it was intended to be substitutional. Such is the case where the two legacies are given by different instruments and the latter instrument is not a codicil but is described as a last will and testament, or is such in effect.

In the case of *Attorney General v. Harley*, 4 Madd. (Eng. Ch.), 267 (decided May 17, 1819), the vice-chancellor said: "If the legacies to Mrs. Harley were alone to be considered, she would be plainly entitled to both; but the question here is whether the instrument does not afford internal evidence that it was meant by the testatrix, not as an addition to the first instrument but as a substitution for it. It begins with all the forms of the first instrument, with the same expressions of religious resignation, nearly in the same words. It then proceeds to appoint Martha Harley her sole executrix, by the same description as in the first instrument; and it then proceeds to give, with little variation, the same legacies to the same persons who were the objects of her bounty by the first instrument. I think the inference irresistible that the testatrix intended the third instrument as a substitution for the first; and that Mrs. Harley must therefore take the unconditional legacy of 1,000£ given by the third instrument, in the place of the conditional legacy given by the first instrument."

In the case of *Hemming v. Gurrey*, decided May 5, 1825, 2 Sim. & S. 212, at page 222, it is said: "With respect to the plaintiff's claim of two annuities of 500£ each, under the two testamentary papers of G. Hemming, I am of opinion that the second instrument was not made as an addition to, but as a substitution for, the first if not wholly, at least in the greater part and plainly as to the annuities in question. This is evident from comparing the form and expression of the two instruments, from the general similarity of the two annuities and legacies, and from the particular gifts of the Barrow and Edgeware estates."

In the case of *Kidd v. North*, decided April 22 and 24, 1845, 14 Sim. 462, "Testator by his will gave to his son 20£ to be paid within one month after his death. . . . By a subsequent testamentary instrument which purported to be his last will, but which he left unfinished, he gave 19£ 19s. to his son. . . . Held, that the legacies of 19£ 19s. . . . were substitutions for the legacies of 20£ . . . previously given to the son."

Again, in the case of *Tuckey v. Henderson*, decided July, 1863, 33 Beav. 176, the master of the rolls said: "I am of the opinion . . . that upon the construction of these two wills of the testatrix, the second instrument was meant to be in substitution for the first. It is true that both are wills of the testatrix, and that both are admitted to probate, and that it is therefore simply a question of construction. But as a question of construction, I am of opinion that the second is substitutionary for the first, as regards the legacies in the first will to legatees who are also named as legatees in the second. This differs from the case of a codicil—a codicil is professedly an addition to the will—but this is professedly a substitution for it. Though it is called 'the last will' that does not prevent the proof of the prior will which is not revoked; . . . I think the legacies are substitutionary and not cumulative."

And on page 177 it is said: "In the case of five legatees the sums are identical, and in all the other cases the same legatees take different sums."

"I am of opinion, regarding it as a question of construction, as the Lord Chancellor did in the case referred to, and considering that although the testatrix calls the second instrument 'my last will,' yet both have been admitted to probate, you must look at the general scope of both and see if substitution is intended. I am of opinion that it is, and I will make a declaration to that effect."

In the case of *Jackson v. Jackson*, 2 Cox C. C. 42, Mr. Justice Buller says: "The first question in this cause is whether the legacies given by the instrument which has been proved in the spiritual court as a testamentary schedule are cumulative, or whether they operate as destroying the legacies given by the will—that is, whether the testator had an inten-

tion of giving the latter legacies as *additions* to or *substitutions* for the former. Now, every part of the testamentary schedule makes this too clear to admit of a doubt. The testator begins it by saying 'I make this my last will and testament'; this therefore is a substitution for a former will, not a codicil added to it. . . . As to the pecuniary legacies themselves, it is equally clear, they were not meant as double; the same sums are given to many of the legatees, though not so to all. If the legacy to Ann had stood alone, there might be some weight in the argument. She took by the first instrument 500£ and by the second 100£, and if there had been nothing in the second *to explain the testator's intent* [under-scoring ours] her legacy must have been taken as cumulative; . . . I think, therefore, upon the whole that it is apparent he did not mean to give cumulative legacies, but to substitute the latter for the former. . . . The legacies, therefore, arise on the second instrument, but came in under the charge made on the land by the first in favour of legatees in general."

It is to be observed that in nearly all cases the third rule of construction hereinbefore set forth is applied only where the second bequest to the same person and of equal or unequal amounts is provided for in a codicil which is attached or added to the testament. A testamentary instrument, complete in itself though not in terms revoking a prior testamentary paper, and which with the latter is admitted to probate as one will, according to all the cases, seems to show conclusively the testator's intention. Although both testaments operate, they do so merely because the latter does not in express terms revoke the former.

A codicil is defined to be "A supplement to a will or an addition made by the testator, annexed to and to be taken as part of, a testament; being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator.

"A clause added to a will after its execution, the purpose of which usually is to alter, enlarge or restrain the provisions of the will, or to explain, confirm and publish it": Anderson's Law Dictionary.

An examination of Mr. Jones' wills shows that a complete disposition of his entire property is made by each. Each contains a residuary clause, and, but for the provisions of section 1296 of the Civil Code, which declares that "a prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; . . . , " the last testamentary instrument executed by Mr. Jones, unquestionably, under the decisions, would have been admitted to probate as his last will. The second instrument did not expressly revoke the former; it is not a codicil but, as has been observed, is a will complete in itself, ending with the words "this is my last will." These words indicate the testator's intention, namely, that the second instrument, so far as the double legacies are concerned, should be a substitution for the first. It follows, therefore, that the bequests to S. L. Abbot the third, W. Brooks Jones and T. Skelton Jones under the latter instrument are in substitution for those contained in the former.

Second: Are the charities entitled to one-third of the estate wherever the same may be situate, and if so, is that one-third payable out of California assets?

Section 1313 of the Civil Code treats of the restrictions on the power of devise to charitable uses. It declares that ". . . no such devises or bequests shall collectively exceed one-third of the estate of the testator having legal heirs. . . ." The "estate" here meant must unquestionably mean the "estate" in California. It cannot be conceived that the legislature of this state would attempt to do so vain a thing as to regulate the disposition of property not within its jurisdiction; and I do not see how it can otherwise than follow as a corollary from a reading of the section last referred to that no such contention can be successfully maintained.

If it be true, then, that the legislature has dealt solely with "estates" in California, it is clear that if the property out of the jurisdiction is at all taken into account to determine what shall be the third to the charities, that more than one-third of the distributable assets in California will be distributed to them, and that such distribution is contrary to section 1313, *supra*.

To illustrate: Say the value of the property in California subject to distribution is \$100,000. Of this amount the charities will be entitled to \$33,333 $\frac{1}{3}$. And assuming that the real property in Washington, D. C., and Virginia will aggregate in value \$10,000. If the latter sum be added to the value of the California property, it will amount to \$110,000, of which the one-third to charity is \$36,333 $\frac{2}{3}$. If, therefore, the latter sum be distributed to the charities, they will receive \$3,333 $\frac{1}{3}$ in excess of what the law declares they are entitled to.

Counsel for the charities, in support of their contention, have cited *Carter v. Board of Education*, 23 N. Y. Supp. 95, 68 Hun, 435; *Kerr v. Dougherty*, 79 N. Y. 327, and *Jenkins v. Trust Company*, 53 N. J. Eq. 194, 32 Atl. 208. These authorities, however, are not in point.

It is held in the *Estate of Hinckley*, 58 Cal. 516, 517, that "The valuation of the inventory is evidently not intended to be conclusive for any purpose. The appraisers made a preliminary estimate for the information of the court; and as property not included in the original inventory is discovered, it is made the duty of the executor or administrator to cause the value of such property also to be estimated by the appraisers: Code Civ. Proc., secs. 1445, 1451. . . .

"Yet it must be assumed that section 1313 of the Civil Code was enacted in view of the provisions of the Code of Civil Procedure which establish the mode of conducting probate cases, since such provisions and those of the Civil Code relating to wills constitute together the statutory scheme for the settlement of the estates of deceased persons. As we have seen, the testator had the right to donate to charitable uses one-third of that which he had power to devise and bequeath. The residuum became fixed, under the Code of Civil Procedure, only when the allowed claims against the estate and costs of administration were determined and the residuum therefore, ready for distribution; that is to say, the total value of the distributable estate—the estate one-third of which may be devoted to charity—is ascertainable by aggregating the values of all the assets, real and personal, distributed, as of the date or dates of distribution."

In *Re Pearsons*, 98 Cal. 611, 33 Pac. 451, the court say: "The one-third of the estate which may be given to charitable

uses is one-third of the distributable assets; and a sale and conversion of the property into money, when the devise is not specific, is a convenient, if not a necessary, mode of ascertaining the amount of the estate for the purpose of determining the quantity thereof to which the charitable beneficiaries are entitled. Until a sale it cannot be determined what is the amount of the estate": See, also, *Estate of Gibson*, 1 Cof. Pro. Dec. 9; *Estate of Behrman*, Cof. Pro. Dec.

I am constrained to hold that the charities are entitled to one-third of the distributable assets of the estate, and that in determining what that one-third is, property situate out of the jurisdiction of this court cannot be taken into account.

Third. Are the residuary devisees and legatees under the prior will entitled to all that part of the residue which the residuary clause of the subsequent will fails to dispose of?

There is no question about the fact that after the charities receive the one-third to which they are entitled by law (Civ. Code, sec. 1313), there will still remain a considerable residuum partly increased by the lapsed legacy to one of the testator's nephews—Robert Brodie Jones.

The question therefore is, Are the two residuary clauses so absolutely irreconcilable as that the former entirely fails? If they are, partial intestacy is the result, and the heirs or next of kin of the testator take in preference to his sisters who are the residuary legatees under the prior will.

As we have heretofore observed, the testamentary instruments were together admitted to probate as one will, and are therefore to be taken and construed together as one instrument (Civ. Code, sec. 1320), and the rule of construction is substantially the same where there are several wills to be harmonized, as where there are several clauses in the same will and codicils: 1 *Woerner on American Law of Administration*, 2d ed., sec. 51, p. 102.

Section 1321, Civil Code, provides that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are wholly irreconcilable, the latter must prevail.

And section 1296, Civil Code, provides that the prior will remains effectual so far as consistent with the provisions of the subsequent will.

The prior will contains this residuary clause: "All the rest and residue of my estate of every kind and nature and where-soever situate I give and bequeath to my two sisters Mary Jones and Virginia Byrd Jones, now residing in Washington, D. C., or to the survivor of them."

The subsequent will contains the following residuary clause: "I leave the remainder of my estate to Grace Church P. E. S. F., to the Protestant Episcopal Old Ladies' Home, Maria Kip Orphanage & Bishop Armitage Orphanage, one-half of said residue to the first named & the balance in equal shares to the three Institutions last named."

Now, in these circumstances, in what respect is the residuary clause of the prior will—which I shall, for convenience, hereafter call the first clause—wholly irreconcilable with the residuary clause of the subsequent will—which I shall likewise for convenience hereafter call the second clause?

It is not contended that the "second clause" is inoperative so as to deprive the charities of their one-third, but counsel for the sisters maintain that as to that part which the charities cannot take under the "second clause," the "first clause" is wholly consistent and reconcilable, for it can only operate in the event that the second clause partially fails. It might well be likened to a case where there are two wills, the first containing a residuary clause and the second none. Or where the latter clause in express terms only disposes of part of the residue. In neither case would there be an inconsistency and no less an irreconcilability. In the former case the residuary clause is necessarily operative, and in the second both will stand. The testator here impliedly bequeathed and devised to charity one-third and the remainder to his sisters.

Section 1313, Civil Code, provides, among other things, that no devises or bequests to charities shall collectively exceed one-third of the estate of the testator leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all such dispositions of property made contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs according to law.

In this case there is an excess of one-third to charities and there are residuary legatees and devisees to take that excess,

and they are certainly entitled to it preferably to the next of kin or heirs of the testator. The very fact of making a will raises a very strong presumption against any expectation or desire on the part of the testator of leaving any portion of his estate beyond the operation of his will.

It must be conceded that the testator knew the law at the times when the testamentary instruments were respectively executed by him, and it must follow that he was conscious of the restrictions placed by law on his bounty to charity. He likewise must have had in mind that his estate might possibly, at the time of his death, be larger than he contemplated, for he purposely left in existence a will (the first) by which, he knew, any surplus would be safely disposed of to his sisters who, as appears from both wills, were the main objects of his bounty. It seems to me that the testator's intention is perfectly clear, and that the clauses are absolutely consistent and reconcilable. A comparison of the wills unquestionably permits the court to transpose the order of these residuary bequests to have them read as follows: To (the aforementioned charities) I give, devise and bequeath one-third of the rest, residue and remainder of my estate, the balance I give, devise and bequeath to my sisters Mary Jones and Virginia Byrd Jones, or to the survivor of them.

It has been held that where it appears from the entire language of a will that the testator's intention would be rendered more clear by transposing the order of the bequests, the court will construe the bequests as though the testator had written them in the transposed order: *Merkel's Appeal*, 109 Pa. 235.

"Where it is possible for the court, upon a reading of the whole will, to arrive at a conclusion that the testator necessarily intended an interest to be given, which is not bequeathed by express and formal words, the court should supply the defect by implication, and so mold the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared": *Estate of Maxwell*, 1 Cof. Pro. Dec. 145.

A failure to give to these wills the interpretation contended for would result in partial intestacy. This is not favored in law.

Our own code provides that of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy: Civ. Code, sec. 1326. And as was said in the opinion by Mr. Justice Andrews, in the case of *Vernon v. Vernon*, 53 N. Y. 361, "The law prefers a construction of a will which will prevent a partial intestacy to one which will permit such result." See, also, *Toland v. Toland*, 123 Cal. 143, 55 Pac. 681; *Estate of Fair*, 132 Cal. 566, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

I am of the opinion that the sisters of the testator take under the residuary clause of the first will the residuum of the estate which is bequeathed to the charities by the residuary clause of the latter will, but which they are unable to take by virtue of the restrictions imposed by section 1313 of the Civil Code.

Let a decree be entered, therefore, in accordance with this opinion.

Although, as a General Rule, the Law Regards Gifts to Charities with favor, the legislatures of some states have, for the protection of heirs, found it expedient to enact a species of mortmain statutes which provide that a will making charitable gifts must be executed at least thirty days before the death of the testator, and that it shall not bestow more than one-third of his estate upon charities. The statute of California on this subject does not govern a will executed in that state devising real property in another commonwealth, since the transmission of real estate is governed by the law of its situs. Moreover, this statute does not apply to gifts other than those by last will and testament, such as those by deed. A codicil executed within thirty days prior to the death of the testator, but relating wholly to other matters than charitable bequests, does not invalidate gifts to charities in the original will.

A charitable gift in excess of one-third of the estate of the testator does not invalidate a power of sale contained in the will, nor does it constitute ground for a revocation of the probate of the will. The only consequence, as a rule, which follows such excessive gifts is a pro rata reduction of the amounts thereof, so that in their aggregate they will not exceed one-third of the estate. And this one-third has reference to the one-third of the estate which remains after the payment of the debts of the decedent and the charges of administration. On appeal to the supreme court, if the inventory is not set forth in

the record, and there is no bill of exceptions or data from which the amount of the estate can be determined, it will be presumed, in support of the decree below, that the residue distributed to charities was less than one-third of the distributable portion of the estate: 1 Ross on Probate Law and Practice, 17.

IN THE MATTER OF THE ESTATE OF JOSEPH P. HALE. DECEASED.

[No. 13,439; decided March 22, 1906.]

Community Property.—The Declaration of a Testator in His Will that the property devised is his separate estate cannot be considered as evidence that it is such.

Community Property—Products of Foreign Real Estate.—Where a married man picks orchilla in Mexico from land owned by himself and his copartners and ships the product to market in England, and the returns are remitted to him at a point over one thousand miles from the place of production, these products together with real estate purchased with their proceeds in California are community property.

Community Property—Profits of Foreign Land.—The rule that property purchased with the rents and profits of land which is the separate estate of the husband becomes likewise his separate property is restricted to cases where the purchase money is the proceeds of land used in the ordinary manner, and does not extend to cases where the products are shipped to a distant country and used in a business venture.

Community Property—Conflict of Laws.—The rents and profits of Mexican land held by a resident of California are subject to the laws of Mexico, and by those laws they are community property.

Real Estate—Conflict of Laws.—Real estate in Lower California is subject to the Mexican law, even if it belongs to foreigners.

Community Property—Conflict of Laws.—Lands Purchased in a community property state with funds derived from real property acquired in a common-law state become the separate property of the husband, even if the funds were acquired in the other state under circumstances which would have made the land from which it was derived community property.

Community Property.—Money Borrowed by a Married Man and not secured by his separate property is community property.

Wills—Intention of Testator.—It Makes no Difference What Language is Used in a will, if the testator's intention can be determined it will be sacredly enforced.

Wills.—The Intention of a Testator must be Ascertained from the words of the will itself; it is not what the testator meant, but what his words mean. The intention to be sought is not what may have existed in his mind, but what is expressed in the language of the instrument itself.

Wills.—The Word "Leave" in a Will, as applied to the subject matter, prima facie means a disposition by will.

Wills.—Injustice of this Disposition.—The intention of a testator, if lawful, must be given effect, however unjust it may appear to the court.

Wills.—A "Limitation" is Particularly Defined to be a qualification of an estate given; "words of limitation are words which mark out the estate to be taken by the grantee."

Wills.—Cutting Down Fee.—Words of Command Addressed by a Testator to devisees are as ineffectual to reduce a fee to an estate for life as precatory or explanatory words; such words are not enough to establish an intention that is not gathered from the operative words upon the face of the will.

Wills.—Necessity for Operative Words.—A devise cannot be created without the use of operative words.

Annuities.—Failure of the Fund.—Where annuities are payable from the rents of a building, and the building is sold during the course of administration, the rights of the annuitants are measured by the rule that when the funds out of which annuities are payable fail, resort may be had to the general assets as in the case of a general legacy.

Alexander D. Keyes, for petitioners.

Sullivan & Sullivan, and Theodore J. Roche, for respondent.

COFFEY, J. Josephine C. H. Boyle, the daughter of the deceased, and one of the principal legatees and devisees in his will, and Anais Hale, his surviving wife, filed herein a petition for the final distribution of the above entitled estate. It is claimed in the prayer of the petition, upon the facts therein set forth, that the entire estate should be distributed one-half to the daughter and the other half to the surviving wife.

To this petition an answer was filed on behalf of the respondent, Ann Feeney Wright, which, it was subsequently agreed, should stand as the answer for the other respondents, who appeared upon the hearing of the petition. The application for final distribution presents two leading questions,

(1) the widow's contention that all of the property is community property, and that one-half thereof should be distributed to her; and (2) the daughter's contention that on a proper construction of the will and after a proper marshaling of the assets all of the residue of the estate should be distributed to her.

In the will of the decedent there is this clause: "I hereby declare and make known that all property owned and possessed by me at the date of this will and wherever situated is property or its income and revenue or property purchased by me with its income and revenue that I owned and possessed at the time of my marriage with my present wife—and is my separate estate."

This declaration has no legal force or effect; is not necessarily a statement of fact; it is merely at most the opinion of the testator; is not binding upon the widow; in short, is not to be considered to prove that the property was separate: *Rowe v. Hibernia Savings etc. Soc.*, 134 Cal. 407, 66 Pac. 569.

Irrespective of this testamentary declaration and upon the evidence, in what way did the testator acquire the property of which he died seised? He married Anais Hale in 1880, and it is admitted that as he had previously acquired the Fresno property and the San Francisco tide lands, these items were separate estate.

On the part of the petitioner it is claimed that the remainder of the estate is community property, having been acquired subsequent to decedent's marriage with his surviving wife.

This property now on hand consists, first, of a six-tenths interest in the orchilla which formerly belonged to the Flores Hale Company, appraised at \$3,283.35.

Second, the unsold portions of the Santa Clara ranch consisting of Lots A, B, and 1 of the Hale Ranch Subdivision, and unsold portions of the Margarita Tract, consisting of all the lots in that tract except lots 1 and 16, all of the Santa Clara county property being appraised at \$15,984.95.

Third, the balance of the cash on hand, being a portion of the proceeds of the sale of the lots and of the supreme court building, as per supplemental account, \$126,535.19.

The decedent and Anais Hale were married July 20, 1880.

The Santa Clara property which is still unsold was acquired June 12, 1886. The lot on which the supreme court building stands was purchased April 5, 1882, and the Flores Hale Company, from which the unsold orchilla was derived, was organized June 9, 1883.

It will be seen that the principal asset, about which there is contention, is the supreme court building or its proceeds.

The claim that all of this property having been acquired during coverture is presumptively community property is contested by respondents, who assert that they have overcome this presumption by showing that it was the proceeds of the rents, issues and profits of property owned by decedent prior to marriage. Respondents contend that from the facts proved it is clear that all of the estate of decedent was at the time of his death separate property, and an enormous amount of erudition is expended to establish this proposition. It is insisted that it is in proof that for years prior to the date of his marriage the decedent was in the exclusive possession of the same tract of land which was subsequently conveyed to the Flores Hale Company, claiming at all times to be its owner and holding himself out as such to the entire world.

But the evidence on this point is scarcely satisfactory. It does not appear to the court that he had a title to this extensive tract prior to marriage. He may have claimed to own the land and he had possession in a manner. He had men roaming and camping about gathering orchilla, but the only evidence of any title, exclusive of the partnership agreement and of the Pacheco grant, is in the statement of James Hale and Byrne that deceased was in possession under a claim of title previously conferred upon him by the government of Mexico, pursuant to contracts entered into between him and that republic. The tract was five million acres in extent. It is plain that such an immense area could not easily be covered by the campers employed by decedent. This claim of title, however, can hardly be sustained by the documentary evidence introduced. It certainly is not established by this species of evidence that decedent at the time of his marriage was the owner in fee of the entire tract of land upon

which the business in which he was engaged was carried on. A long and learned discussion is indulged in by respondents to overcome the effect of the Pacheco grant of 1883, but it is more interesting than convincing, and need not here be traversed. It is enough to say that decedent was the real party to this grant, James Hale being a mere agent, as is shown by the evidence.

The decedent went to Lower California some time before 1862. He hired gangs of men and sent them out through the country for the purpose of having them gather orchilla, which is a moss of natural growth reproduced without cultivation in two or three years. The men employed by the decedent were usually divided into camps and the number employed at one time reached as high as fifteen hundred to two thousand men. There were never more than two or three camps in actual operation. The camps moved from place to place after gathering the orchilla in question and sent it to Magdalena bay; there it was pressed into bales and shipped to Liverpool and the proceeds of the sales were remitted to the deceased.

The orchilla was never sold in Lower California, at the place of production, and the parties who had charge of the camps never knew anyone else in the occupancy of the land over which their operations extended, and understood the decedent to claim that he owned the land in question.

There is no direct evidence of the profits of this business, but there is direct evidence that the business was very extensive, and that the credits during the years 1876 to 1882 both inclusive, exceeded \$1,000,000. At the close of the different years there were on hand the following balances:

| | | |
|------|-------|-------------|
| 1876 | | \$19,895.00 |
| 1877 | | 20,423.19 |
| 1878 | | 7,542.09 |
| 1879 | | 44,035.06 |
| 1880 | | 6,194.94 |
| 1881 | | 28,115.76 |
| 1882 | | 58,316.00 |

There is nothing in the evidence to show that these balances were profit, and in point of fact the balances of each year

were carried into the accounts for the next year, so that there was no net balance for the entire period covered by the transcript put in evidence, which period ended January 31, 1883.

If the evidence had stopped here it is possible that the court might be justified in holding that the lands upon which the operations of the decedent were carried on, where the orchilla was picked and where no adverse occupants were found, belonged to the decedent; but the documentary evidence which the court has to consider, and which bears the admitted signature of the decedent, shows that only a small portion of these lands belonged to him.

On the eleventh day of June, 1880, the decedent entered into a copartnership agreement with Bartning Bros. and Gilbert. Each of the partners furnished or brought in certain lands and personal property. The decedent's share of the partnership funds were inventoried at \$43,295, and consisted of \$14,000 worth of land "with title," of about \$8,000 worth of land "adjudged and claimed"; total \$22,000 worth of land and about \$21,000, worth of personal property and improvements on land. Bartning Bros. furnished about the same amount of property, consisting of lands with full title, "lands in course of obtaining title," "lands rented," boats and other personal property. Felix Gibert brought in about \$13,000 worth of property, consisting nearly entirely of lands with full title and lands "in course of adjudication." The partnership agreement was signed by J. P. Hale on June 11, 1880. The inventory was approved by the attorney in fact of Gibert on July 20, 1880. The partnership was to last for five years.

The agreement recited that by a previous agreement dated the 11th of March, 1880, J. P. Hale and Bartning Bros. had entered into an agreement with Felix Gibert at La Paz, Lower California, under the firm name of Hale & Company, for the purpose of operating at Magdalena bay, Lower California. That the partners had reached the conclusion that it would be better to dissolve this partnership and to form another special copartnership "directed solely by J. P. Hale and under his name: to realize said stock, gather, purchase and sell orchilla at Magdalena bay, Lower California, . . . under the following conditions:

"First. The capital of the association is formed with the property specified in the inventory. . . .

"Second. Mr. J. P. Hale will continue the trade and business at Magdalena bay as he has done up to the present time, using the capital as per inventory and the cash that may be necessary which shall be provided by him and by Messrs. Bartning Bros. Co. in equal shares.

"Third. Out of the net profits that may result Messrs. Bartning Bros. will receive forty-two per cent; Mr. Felix Gibert sixteen per cent, the remainder being for Mr. Hale.

"Fourth. Mr. Hale will give the contracting parties monthly a brief statement of the operations and accounts and a general balance statement every year.

"Fifth. During the existence of this partnership none of the contracting parties shall acquire for himself any orchilla lands in Lower California, nor grant any person whatsoever his interest therein.

"Sixth. The stock of Orchilla—at Magdalena Bay, will be shipped by Mr. Hale, to be sold for account of its respective owners.

"Seventh. Mr. Hale will endeavor to obtain advances in Europe on the most possible advantageous terms. . . .

"Ninth. This agreement shall last five years.

"Nothing obtained in this agreement prevents Mr. Hale from applying himself to other business and enjoying individually and exclusively the products thereof, excepting the gathering, purchase or sale of orchilla."

"In case of the death of any of the contracting parties, their heirs or executors shall continue this agreement for one year. Should Mr. Hale die, then Messrs. Bartning Bros. will be the directors, but Santiago Hale will continue as administrator during the time the partnership shall exist."

There are two things that are plain from this agreement.

First, that Mr. Hale did not own the lands from which the orchilla was gathered.

Second, that he was not operating on his own account, but on the account of a copartnership which divided with him the profits of the venture.

The former of these points would require no corroboration, although James Hale himself testified that among the lands on which the orchilla operations were carried on were the following: San Carlos, Bajos de Sta Domingo, San Juanico, Ojo de Liebre, San Juan, San Francisco, Medano de las Jiquimas, Santa Rosa, Salinas, Mesquital, San Pedro and San Pablo. All of these lands were brought into the co-partnership by Bartning Bros. & Co.

Independently of the evidence on the subject of lands and business in Lower California, the only evidence of any property owned by the decedent at the time of his marriage consists of the evidence that he owned the following real estate: First, the Oak street property, which was improved with a cottage; second, the lot on Market street, near City Hall avenue; third, the partnership lands; fourth, the San Francisco tide lands. There was no evidence as to the value of any of these lands or as to the income if any which they produced.

In regard to the cash on hand at the time of the marriage, the only evidence before the court consists first of the bank book of the Donohoe-Kelly Banking Company. This book was not balanced at the time of the marriage and therefore does not show that the decedent had at that time any balance whatsoever. It was balanced, however, some time between April 29 and June 11, 1880, and shows no balance on hand. The next balance was struck August 3, 1880, when the decedent had on hand \$496.65. Between these two periods he deposited \$11,162 and drew out \$10,665.15. As above stated, there is no evidence that in the Donohoe-Kelly Bank at the time of the decedent's marriage there was any cash to his credit.

So far as the orchilla business account is concerned it showed on July 20, 1880, a credit balance of \$12,594.18. The only other evidence which is material on this subject is that the decedent as early as 1876 and as late as 1886 was continuously borrowing money on promissory notes from the Donohoe-Kelly Bank.

It also appears from the testimony of James Hale that the contract between James Hale and General Pacheco, acting on behalf of the Mexican government, was made by James Hale solely for the benefit of his brother Joseph P. Hale.

The terms of this contract are material for the purpose of showing that the decedent was not solely engaged in the business of gathering, shipping and selling orchilla.

The contract between General Pacheco, acting for the Mexican government, and J. Conrado Flores, for himself and on behalf of James C. Hale & Co., was made March 31, 1883, and provided as follows:

The Flores Hale & Co. (Flores and James C. Hale, who was acting for Joseph P. Hale) were authorized to "effectuate the measurement and demarcation of the public lands existing in the territory of Lower California between the parallel of $23\frac{1}{2}$ and 29 degrees latitude north in a zone of six leagues width counted from the mark of the full tide toward the interior. . . . In consideration of the expenses caused by the aforesaid acts Flores Hale & Co. shall receive as their property one-third of such lands as they may survey.

"The government conveys to Flores, Hale & Company the remaining two-thirds of the lands they may survey to be exclusively applied to colonization purposes at the price fixed by the tariff."

The Pacheco contract, therefore, was a contract by which the government agreed to convey lands in consideration that the grantees would survey certain public lands and colonize others. In a certain sense the business undertaken by the Flores Hale & Company (in which the decedent was of course interested) might be termed a part of the orchilla business, because doubtless the lands in question were lands which produced orchilla, but in a strict sense the business in question was the business of surveying and colonizing lands for hire, and the profits of any such venture should certainly not be classed with the rents and profits received from the ordinary use and occupation of land.

To sum up, therefore, the evidence shows the following state of facts:

First. The decedent was not exclusively engaged in the business of picking and selling orchilla.

Second. The orchilla which he did pick did not come from his own land, but partly from land that belonged to him and partly from the land that belonged to his partners.

Third. The orchilla which was picked was not sold on the land in the usual manner in which the products of land are sold, but was shipped a distance, say, of twelve thousand miles, and the money was remitted back to another point approximately five thousand five hundred miles from the place of sale and over one thousand miles from the place of production.

The authorities which declare that property purchased with the rents, issues and profits of land which is the separate property of the husband becomes likewise his separate property, restrict the rule to cases in which the purchase money is the proceeds of the land used in the ordinary manner, but no case has gone so far as to hold that the products of land when shipped to a distant country and used in a business venture shall be treated as the "rents, issues and profits" of land.

Fourth. The funds were not traced from the alleged separate property of the decedent into the alleged investments.

Fifth. The land which was alleged to be the separate property of the decedent was situated in the Republic of Mexico and was subject to its laws. The rents, issues and profits of land are in effect the land. Hence the rents, issues and profits of this Mexican land were subject to its laws, and by those laws they were community property.

Article 14 of the Civil Code of the federal district, territory of Lower California, provides, "As to real estate situated in this state it shall be subject to the Mexican law even if it belongs to foreigners."

Article 2141 provides as follows: "The following is community property: Subd. 7. Fruits, accessions, rents, and interests received or due during coverture arising from the community or separate property of either consort."

The law of the situs of real estate governs real property. This is elementary; and it has always been held that lands purchased in a community property state with funds derived from real property acquired in a common-law state became the separate property of the husband, even if the funds were acquired in the other state in circumstances which would have made the land from which it was derived community property of the spouses: Estate of Burroughs, 136 Cal. 116, 68 Pac.

488 (per Temple, J.); *Tanner v. Robert*, 5 Mart. (La.), N. S., 255; *Nott v. Nott*, 111 La. Ann. 1029, 36 South. 109; *Clark v. Thayer* (Tex.), 71 S. W. 1050.

These cases present the converse of the case at bar. There the money which bought the land in Louisiana and Texas would have been community property if the entire transaction had taken place in Louisiana and Texas, but as it came into Louisiana and Texas as separate property, the investments made with it were held to be of the same character as the money was in the foreign state.

It having been determined that one-half of the cash on hand, one-half of the unsold orchilla and one-half of the Santa Clara county lands must go to the widow as her share of the community property, the next question that presents itself is, To whom shall the residue be distributed?

| | |
|--|-------------|
| This residue consists of one-half of the orchilla..... | \$ 1,641.67 |
| One-half of the Santa Clara county lands..... | 7,997.47 |
| One-half of the cash on hand..... | 63,267.60 |
| The Fresno land, worth..... | 1,000.00 |
| The San Francisco tide lands, worth..... | 402.00 |

| | |
|---|-------------|
| Total estate after community interest of widow is taken | \$74,308.74 |
|---|-------------|

From the foregoing it will be seen that the court has adopted the view of the petitioners and discarded the deduction of the respondents that the entire estate left by the decedent, under the law and the facts, constituted his separate property and estate.

Petitioners in their reply brief advert to the fact that there are two considerations of considerable importance which are not referred to in the respondents' brief: First, the evidence shows that after the marriage of the decedent to Anais Hale, and for a long period of time, he was constantly borrowing large sums of money without security from the Donohoe-Kelly Banking Company. Money borrowed on the personal security of a married man not being "property owned before marriage," and not being "property acquired by gift, devise, bequest or descent," nor the rents, issues or profits of either, is community property: Civ. Code, 163, 164.

Money borrowed by a married man and not secured by his separate property is community property: *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66, 37 Pac. 757; *Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719. The evidence, therefore, shows that large sums of money came to the decedent from sources other than his orchilla business. There is nothing to negative a presumption that these sums might have purchased some of the property in question. Secondly, respondents' argument to the effect that all of the land covered by the Pacheco grant belonged to him before he was married is negated by the exhibit entitled, "List of Deeds of Lands in Lower California in Box Marked J. P. Hale, Spanish Deeds." This exhibit is entirely in the handwriting of the decedent, and gives a list of a large number of grants, contracts and other papers, giving in each instance the date of the grant and the number of hectares covered by the grant. The two main grants were made in 1884. There were several made in 1877 and 1878, and a great many made in the early part of 1882. It is a fair presumption that this list gives a brief history of the titles to the land which passed to the Flores Hale & Company, and shows that some of these lands were acquired before marriage, and by far the greater number were acquired long afterward.

The next point is as to the construction of the will. The question as stated by respondent is: Did the deceased, in his will, make a valid devise of the remaining one-half of the Supreme Court property to Margaret Ryan and certain of his other brothers and sisters named near the end of paragraph 1 of his will, contingent upon failure of issue in his daughter? In other words, did not the deceased devise to his daughter, in fee simple, but one-half of the land, and qualify the remaining one-half by making an unqualified or fee simple title in her, dependent upon the fact that she die leaving issue?

The position assumed by respondent is that the will clearly indicates that it was the intention of the testator, when he made his will, that his daughter, Josephine, should only have a fee simple title to one-half of the property upon the death of his wife, and that as to the remaining one-half, her title

should be qualified by having issue; and that upon failure of such issue, this one-half should, by virtue of the will of the deceased itself, vest in, and was by him devised to, the brothers and sisters above referred to.

The decision of the court, so far as it relates to this question, must depend upon the interpretation which it shall place upon the will.

Respondent claims that the language of the will is clear, direct and unambiguous, creating a remainder in the undivided half of the Supreme Court building in favor of certain relatives; and sections of the Civil Code and many pages of extracts from decisions are quoted to support this thesis.

The words of the will which are claimed to create this remainder are the following: "My said daughter Josephine to own and hold said house or building and the land upon which it is situated . . . without the power to sell or mortgage the same during her natural life, but with power to dispose of the same as she may desire by her last will in case she has any issue then living. But in the event of her having no issue at the time of her death as aforesaid, then she shall only will one-half of the said building and lot, leaving the other one-half to be divided between my sisters, my relative, and my aunt."

Respondent asks, What was the intention of the deceased concerning this property? And answer that it was, first, that his daughter, Josephine, should have one-half of the net rents of the Supreme Court building, during the life of his wife, and until the annuities to be paid out of the other half had been fully satisfied; second, that if his daughter, Josephine, had issue living at the time of her death, she was to have the entire property, with the right to will it to whomsoever she desired, which under the law of this state, would be a title in fee simple; third, if, however, his daughter failed to have issue, then that the persons referred to, being some of his brothers and sisters, and an aunt, or her daughter, should have the remaining one-half of her property.

In the paragraph from which the quotation is made testator created the annuities, and made them a charge upon that half of the rents and profits not given to his daughter.

Respondents call attention to the fact that all of the language used by the deceased by which he attempts to effect a devise of the property is contained in but one paragraph, and remark that there is no separation whatever between any part of the language, except in the punctuation of sentences.

Therefore, they say, the court, in determining the intention of the testator, has to deal with but one continuous paragraph of this will, and it must also be borne in mind that the will, which is to be construed by the court, was not compiled by a man learned in the law or even by one who had a very large vocabulary, or had the power of choosing apt words and phrases to express his ideas and intentions. It was written by the deceased himself, who, though evidently having had a varied, as well as extensive, experience in business matters, did not possess any great amount of literary attainment. It may be true that if he had consulted a lawyer in the execution of this instrument, the language used in expressing his intention would have been different from that in which it is couched. But as the decisions hold, it makes no difference what language is used by the deceased in his will, if his intention can be determined, it will be sacredly enforced.

It must be ascertained, however, from the words of the will itself. It is a familiar phrase formulated by our supreme court that it is not what the testator meant, but what his words mean. The intention to be sought for is not that which may have existed in his mind, but that which is expressed in the language of the instrument itself.

It is claimed by respondents that the words in the last paragraph of the clause quoted do not admit the construction placed upon them by petitioner, who says that by them testator does not give any interest in the land to the relatives indicated, but directs the daughter to leave it to be divided among them, and respondent asserts that it is not absolutely impossible to so construe the will without violating its letter and spirit.

Upon this point respondents construct an elaborate argument to show that the word "leave" or "leaving" cannot be construed to mean that the property should pass by the laws of succession, for the use of this word in instruments has been held by courts to impress upon them the character of wills.

In the case of *Doe v. Thorley*, 10 East, 438, the deceased bequeathed to his wife "all his personal estate during her natural life and also at her disposal afterward to leave it to whomsoever she pleased." In holding that this merely gave her the right to will it, and not deed it, Lord Ellenborough, C. J., used the following language: "In common understanding the word 'leave' must be taken to apply to that sense of it in which a person making his will would naturally use it, namely, by a testamentary disposition. But I found my opinion on the word 'leave,' which shows that the testator meant the power to be executed by the will."

Mr. Justice Bailey, in a concurring opinion said: "The word 'leave' as applied to the subject matter *prima facie* means a disposition by will." To the same effect, see *Allen v. McFarland*, 150 Ill. 455, 37 N. E. 1006; *McKonkey's Appeal*, 13 Pa. 253; *Mitchell v. Donohoe*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614.

In the case under discussion, respondents contend that it cannot be construed to mean that the deceased intended his daughter to will it to his relatives, because, as has already been stated, in positive and direct language, he deprived her of that power. In some of the cases cited by respondents, it was held to be necessary for the court to transpose words, in order to arrive at the intention of the testator. In others it was held necessary to supply the omission of words not contained in the will, and in other cases, some of which are not cited, it was thought necessary for the court to take testimony showing the circumstances surrounding the execution of the will; but in this case it is unnecessary to do any of these things, according to the argument of respondents, who insist that the intention of the deceased to devise to certain of his relatives a remainder in one-half of the Supreme Court property, contingent upon the failure of issue in Josephine, is as transparent as though it were expressed in words selected and phrased by the most eminent lawyer practicing at our bar. It matters not in what language this intention is indicated. If it can be gathered from the language used, and the intention is one which is lawful and not prohibited by our law, then it must be enforced, however unjust it might appear to the court.

In order to present as shortly as possible the matter of difference between the counsel, the position of petitioner is that the clause does not impose a limitation, but is simply a direction to the daughter not to will the land, but to leave it to the persons in question. In other words, the testator does not himself give any interest in the land to the relatives, but directs the daughter to leave it to be divided among them.

This is not a limitation of an estate. The meaning of a limitation is practically defined to be a qualification of an estate given. To the same effect are the authorities. It will suffice to quote Williams on Real Property, pages 210-211, who says that "words of limitation are words which mark out the estate to be taken by the grantee."

There are no words in this will which limit or mark out the estate to be given to Josephine C. H. Boyle. The most that can be said is that the clause which prohibits her from disposing of the estate by will and which directs her to leave it to be divided between the six relatives creates a clear interference that the testator meant that they should have the estate in the event that the daughter would die without leaving issue. But this is not enough; for it is provided in section 1322, Civil Code, that "a clear and distinct devise or bequest cannot be affected . . . by any other words not equally clear and distinct, or by inference or argument from other parts of the will." This rule is but a codification of the rule of the common law.

In *Boyle v. Boyle*, 152 Pa. 115, 34 Am. St. Rep. 629, 25 Atl. 494, the court said: "We held that words of command addressed by the deviser to the devisee are as ineffectual to reduce a fee to an estate for life as precatory or explanatory words. Mere precatory words or words of command or words of explanation are not enough to establish an intention that is not to be gathered from a consideration of the operative words upon the face of the instrument."

The case of *Sprankle v. Commonwealth*, 2 Walk. (Pa.) 420, is a case which, in the opinion of petitioner, is remarkably like the case at bar. The words of the will which created an interest in the testator's nephew, Peter Sprankle, were the following: "I give and bequeath to my nephew, Peter Sprankle, all of my messuages, lands and tenements whatsoever. I

hereby also say that Peter Sprankle is not to sell nor can it be sold or disposed of for the debts of said Peter Sprankle during his lifetime, and after his death if he leaves no heirs, the aforesaid lands, messuages, and tenements to be willed by him to some Sprankle name, or if no will be made by him the said Peter Sprankle the said lands to revert to some of the Sprankle family." It was held that Peter took an estate in fee simple.

It was therefore apparent petitioner maintains that, subject to a life estate given to the widow and subject to the annuities, all the testator's right, title and interest in the Supreme Court building passed to his daughter Josephine. The interest that was given was clearly a fee simple interest in one-half of the building and a fee simple interest in the remainder after the death of the wife.

The only words which can create any interest in the sisters, the relative and the aunt are the words "leaving the other one-half to be divided between my sisters, my relative and my aunt." These words clearly show that Josephine Boyle shall will only one-half of the lot of land and Josephine Boyle shall leave the other half to be divided.

The meaning of the will is plain in this respect. The testator directed Josephine Boyle to leave the one-half to be divided, and the petitioners assert that "devise cannot be created by directing another devisee to leave a portion of the property to third parties." In other words, a devise cannot be created without the use of what the supreme court of California calls "operative words."

This principle is established in the two cases of Estate of Fair, 132 Cal. 530, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000, and Estate of Young, 123 Cal. 337, 55 Pac. 1011.

In the Estate of Fair there was an unmistakable intent on the death of the children of the decedent the grandchildren should obtain an interest in the property, and if the children died without issue, that certain other persons should acquire an interest in the land. It was just as plain that Fair meant his grandchildren to have an interest in his estate as it is in the case at bar that Joseph P. Hale intended his sisters, his relative and his aunt to have an interest in the Supreme Court building. Nevertheless, the supreme court held that

because there were no operative words to create this interest, the grandchildren of the decedent were entitled to nothing, and the court used this language (132 Cal. 530):

"Appellants indulge in frequent invocations of the rule that the intention of the testator must prevail, and they seek here to apply the rule to the point that this will should be construed as if it directly devised estates in remainder to the classes named. . . . But the rule includes the propositions that the intention must be found in the will itself; that where the language of the instrument is unambiguous and clear, there is no field for the play of construction; that where the testator has clearly expressed one intention, the court cannot impute to him another. . . . And 132 Cal. 531: The principle that the intention which the testator has clearly expressed in his will must be followed, and that . . . the will cannot be construed as intending a direct devise where the clearly expressed intention is otherwise, and that there cannot be a devise without operative words sufficient to create it is aptly illustrated in the Estate of Young, 123 Cal. 337, 55 Pac. 1011."

In the Estate of Young the intention of the testatrix was equally clear: "To C. H. Young, my husband, my bank book shall be handet to him with gold watch and chain also two deeds. After my husband deatts the two deeds shall go to Katarina Muhr."

It was obvious that when the testator said the two deeds shall go to the husband and after his death to Katarina Muhr, she meant that the husband should have the land for life with the remainder in fee to Katarina Muhr, but the court, in rejecting this construction, said: "There was no delivery of these deeds during the testatrix's life. What validity they possessed then comes from the will, and, therefore, if by act of the testatrix title to these lands passed, we must find in the will both an intent to devise them and operative words to effect the intent. . . . 123 Cal. 344: If the legal effect of his expressed intent is intestacy, it will be presumed that he designed the result.

"The inquiry will not go to the secret workings of the mind of the testator. It is not what did he mean, but it is, what do his words mean?"

In the case at bar the words of the testator mean that Josephine Boyle should leave the property to be divided between the six persons in question. There are no operative words which create a direct devise, and therefore it is void.

Even if there were a case of intestacy, this result would follow; but it is contended that the case is still stronger in this instance of a previous and a subsequent devise.

The previous devise is as follows: "I give and bequeath to my daughter Josephine one-half of the net rent and profits of my building known as the Supreme Court Building. . . . Also all the above described lands, with the building, after the death of my present wife. My said daughter Josephine to own and hold said house or building and the land on which it is situated. . . ."

The subsequent devise is in these words: "Tenth: I hereby authorize and empower my executors to sell and convey all and any of my property, real and personal, except the property on the corner of Larkin and McAllister known as the Supreme Court Building, which is devised to my daughter as set forth in this will."

The devise to the daughter is plain. The alleged devise to the sisters, the relative and the aunt at most is an inference. Section 1322, Civil Code, therefore applies: "A clear and distinct devise or bequest cannot be affected by . . . other words not equally clear and distinct, or by inferences, or argument from other parts of the will."

Petitioner asserts that in the case at bar the testator did not give the land to another upon the death of Josephine Boyle without issue. The most that the testator did was to declare that if Josephine Boyle should die without issue she should leave it to such other persons. The rule, therefore, which applies is the rule set down in *Boyle v. Boyle*, 152 Pa. 115, 34 Am. St. Rep. 629, 25 Atl. 494.

The respondents claim that the testator could not have meant that Josephine Boyle was to leave the property to the sisters, the relative and the aunt, because she could only leave it by two methods, one by intestacy, and the other by will. He could not have intended intestacy, it is said, because intestacy would not have brought about the result in question,

the sisters, the aunt and the relative not being the heirs at law of Josephine Boyle; but it is said he could not have intended that Josephine Boyle was to will the property because he had previously said that she should not will it. Whatever the testator may have meant, he certainly did say that Josephine Boyle was to leave the property to the persons in question. Whether he meant by intestacy or by testament we need not inquire; but there is strong reason for believing that he meant his daughter to leave the property by her will to the persons in question. It is true he says she shall not will it, but a later clause of his will shows that this prohibition against willing referred to an unfettered power to will, for he says (third paragraph): "Should my daughter die without issue the one-half the property . . . which she has a power to will one-half of, it shall go to the charitable institutions in this city or state as she may select, and the other half to whom she wishes, making one-fourth of the property left to her discretion to will to whom she pleases provided she dies without issue."

Now, the testator says in this paragraph that there is only one-fourth of the property left to her discretion to will to whom she pleases, which tends to show that the other three-fourths were intended to be willed by his daughter in the manner in which he had directed. But whatever he may have meant he certainly said that his daughter was to leave one-half of the Supreme Court building to the sisters, the relative and the aunt, and the word "leave," as the respondents say, quoting the case of *Doe v. Thorley*, 10 East, 438, "as applied to the subject matter prima facie means a disposition by will." If he did not mean a disposition by will he may have supposed that he could constitute the sisters, the relative and the aunt the heirs at law of his daughter. But whatever he may have meant he certainly said that whatever right, title or interest should come to them should pass to them by being left to them not by him, but by his daughter.

I have gone over carefully the briefs of counsel and have endeavored to present their points of variance on the main questions, and had intended to proceed further in an attempt to state the grounds of decision, but so much time has

elapsed that it is expedient the case should be decided without further delay, and I must content myself now with saying that on the issues hereinabove discussed I am of the opinion that the law as declared in California is correctly set forth by the counsel for petitioner.

With respect to the annuities, while the counsel for petitioner says it is a matter of simple solution, this court has been very reluctant to accept his conclusion, but after serious consideration it seems to be sound as he states it.

The property out of which the annuities are payable consists of the rents of the Supreme Court building. The rents of the Supreme Court building have certainly failed, and will never again come into the hands of the distributees of this estate. The money on hand was not derived from the rents of that building, but was derived from the proceeds of its sale. Therefore, the particular property which the testator designated as the fund from which the annuities were payable has, in fact, failed. The rights of the annuitants are, therefore, measured by subdivision 3 of section 1357 of the Code of Civil Procedure: "If the funds or property out of which they (the annuities) are payable fails, resort may be had to the general assets as in the case of a general legacy."

It is true that the money on hand is, to a certain extent, treated for the purposes of distribution as the Supreme Court building would have been treated if it had not been sold. But the reason why the funds are so treated is not that the funds and the building are identical, but the devisees of the Supreme Court building, being preferred devisees, are subrogated to the rights of those to whom the funds on hand would otherwise belong. For that reason only the fund must be distributed to the devisees of the Supreme Court building as their interests shall appear, and with such contributions and allowance between themselves as the several preferences shall require.

For years during the progress of this administration the court sought to save the Supreme Court building from sacrifice, for the sake of the annuitants, and to execute the intention of the testator, but at last it had to be sold, and although the court regrets that this result had to be reached, it seems to have been an unavoidable consequence of circumstances.

Finally, the theory of the law governing this case as advanced by petitioner is accepted by the court and the prayer of the petition is granted.

The Presumption that Property Purchased During Marriage is Community Property is very cogent, and can be repelled only by clear and conclusive proof; but where it is established clearly and conclusively that the property was purchased with the separate money of one of the parties, it remains the separate property of the party with whose money it was purchased: *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41. See, also, *People v. Swalm*, 80 Cal. 46, 13 Am. St. Rep. 96; *Svetinich v. Sheean*, 124 Cal. 216, 71 Am. St. Rep. 50; *Crochet v. McCamant*, 116 La. 1, 114 Am. St. Rep. 538. Where property is purchased partly with the separate funds of a wife and partly with community funds, it belongs to the separate and community property in the proportion in which the moneys came from each: *Heintz v. Brown*, 46 Wash. 387, 123 Am. St. Rep. 937, 90 Pac. 211.

Personal Property Acquired by Either Husband or Wife in a Foreign Jurisdiction which is by the law of the place where acquired the separate property of either, continues to be such property when brought within this state, and if invested in or exchanged for real property, such property becomes separate estate also: *Brookman v. Durkee*, 46 Wash. 578, 123 Am. St. Rep. 944, 90 Pac. 914. And if money acquired by a married woman in one state as a member of a partnership there becomes her separate property, and is brought into another state and deposited as the funds of such partnership her share thereof remains her separate property, and real estate there purchased by her and paid for by a check of such partnership, in a sum less than her share of such deposit, is not subject to her husband's separate debt: *Elliott v. Hawley*, 34 Wash. 585, 101 Am. St. Rep. 1016, 76 Pac. 93.

IN THE MATTER OF THE ESTATE OF MAX H. KERSHOW,
DECEASED.

[No. 25,326; decided January 18, 1902.]

Will Contest.—The Burden of Proof in a Will Contest is on the contestant, and he should establish by a preponderance of evidence the issues which he tenders.

Will Contest.—The Judgment of a Court of Another State admitting to probate as the last will of a decedent a document earlier in date than the one in contest is admissible in evidence under the general issue raised by an allegation that the document propounded as the last will of the decedent is not his will and a denial of this allegation.

Probate of Will.—Extraterritorial Force of Decree.—A probate proceeding is a proceeding in rem, and a decree admitting a will to probate is confined in its operation to things within the state setting up the court.

Probate of Will.—Foreign Decree.—“Full Faith and Credit” is given to a probate decree abroad, when the same faith and credit is given to it which it has at home, which is, that it is conclusive evidence of the validity of the will as affecting title to things within the jurisdictional limits of the court at the death of the testator, whether such title comes in contest within or without those limits; but de jure no evidence whatever of title to things not then within those limits.

Foreign Decrees.—The Constitutional Provision that Full Faith and Credit shall be given in each state to the judicial proceedings of every other state is not designed to extend the jurisdiction of local courts or to extend beyond its limits the operation of a local decree, but to provide a mode of authenticating evidence of the record of a judicial proceeding had in one state, so that a proper general result of it may conveniently be attained in every other state against persons and things justly within the range of the proceeding.

Probate of Will.—When not Barred by Prior Foreign Probate.—Where a testator's domicile at the time of his death was in this state, and he left personal estate therein, a decree of a court of another state, rendered upon constructive notice, admitting to probate a prior will, is no bar to the jurisdiction of a court of this state to admit to probate a subsequent will presented to it for that purpose.

Wills.—A Person is of Sound and Disposing Mind who is in full possession of his mental faculties, free from delusion and capable of rationally thinking, acting and determining for himself.

Insanity.—A Lucid Interval is a Period of Mental Clearness enjoyed by an insane person; it is an interval during which the patient is restored so far as to be able beyond doubt to understand and to do the act with such reason, memory and judgment as to make it legal.

Insanity.—A Statement that a Person may have had Reasoning Power and yet have been unsound in mind imports a contradiction in terms, as does the statement that a person had strong will power and yet was unsound in mind.

Wills.—Where a Person Who has Indulged in Intoxicants to such an extent as to debilitate his mind suspends his drinking for a period, and by such suspension so far regains possession of his faculties as to admit of the presumption that his will was made during the time of his calm and clear intermission, the testament is held good.

Wills.—Insane Delusion.—Unless a Will is the Very Creature of a morbid delusion put into act and energy, it is a valid will. The mere fact of the possession of a delusion may not be sufficient to render a person incapable of making a valid will; a person of sufficient mental capacity, though under a delusion, may make a will; if the testament is in no way the offspring of such a delusion, it is unaffected by it.

Wills.—Moral Quality of Testament.—A court has neither right nor power to quarrel with the moral quality of a testator's acts; it may not say that he should have made a different disposition; it cannot make a will for him.

Wills.—The Constituents of Testamentary Capacity are that the testator has an idea of the character and extent of his property, and is capable of considering the persons to whom and the manner and proportions in which he wishes his property to go.

Will Contest.—Upon a Review of the Evidence, it was held in this case that the document offered for probate was executed by the decedent as and for his last will; that it was executed and attested in accordance with the law of this state, and that the testator was, at the time of such execution, of sound mind and competent in every respect to dispose of his estate by will.

Max H. Kershow died in San Francisco, state of California, on June 26, 1901. On September 6, 1901, Hall McAllister and Rhea Gettings presented to the court a document bearing date the sixth day of April, 1901, and purporting to be the last will and testament of the decedent, together with a petition for the probate thereof and for the appointment of petitioners as executor and executrix thereof respectively.

On September 23, 1901, Hall McAllister filed a renunciation of his right to act as executor, and on September 27,

1901, Rhea Gettings, by leave of the court filed an amended and supplemental petition for the probate of said document and for her appointment as executrix thereof.

On October 10, 1901, Carlton M. Kershow, a brother of decedent, filed written grounds of opposition to the probate of the alleged will.

As grounds of opposition, contestant alleged that the decedent at the time of his death was a resident of Philadelphia, Pennsylvania, and not a resident of San Francisco, California, and that he did not leave any estate whatsoever within the state of California; that the document offered for probate is not the last will and testament of decedent, and that he did not at any time affix his signature thereto as and for his last will and testament or for any testamentary purpose whatsoever; that said document was not signed by the decedent in the presence of J. Morgan Smith and A. J. Meadows, whose names are subscribed thereto as witnesses, nor in the presence of either of them, and that decedent at no time declared or published or acknowledged said document to said witnesses, or either of them, as his last will and testament, or as any will or testament whatsoever, and that neither Smith nor Meadows was, at any time, requested by decedent to subscribe his name to said document as a witness thereto, and that neither of them did subscribe his name to said document as a witness or otherwise in the presence of decedent or in the presence of the other; that at the date when the signature of decedent was affixed to said document, he was not, and for a long time prior thereto had not been, of sound and disposing mind, but, on the contrary, that he was at said time, and for a long time prior thereto had been, by reason of disease and disability, of unsound mind and incompetent to dispose by will of his estate.

On October 14, 1901, the proponent filed her answer to the written grounds of opposition, denying specifically each of the matters set up as a ground of contest. Both parties waived a trial by jury, and on November 18, 1901, the trial of the contest was commenced before the court sitting without a jury.

M. F. Michael, William Rix and Bishop, Wheeler & Hoefler, for contestant.

H. I. Kowalsky, Edmund Tauszky and Deal, Tauszky & Wells, for proponent.

COFFEY, J. The burden of proof being imposed upon the contestant, he should establish by a preponderance of evidence the issues tendered by him.

1. As to jurisdiction, this is found against the contestant, it appearing that decedent, Max Howard Kershow, was, according to his own sworn statement, a resident of the city and county of San Francisco on the nineteenth day of July, 1900, when he was registered as a qualified elector by the registrar and that he had not subsequently changed his residence. At the time of his death in this city and county he left estate herein consisting of money in bank and personal effects. These facts clothed the court with original jurisdiction; but it is claimed by contestant that this court is divested of authority in the premises because of a judgment rendered in the orphans' court of Philadelphia, Pennsylvania, July 10, 1901, admitting to probate a will of a date prior to the paper here propounded, the record of which proceeding is properly before this tribunal under the general issue, it not being necessary to plead it specially. As it might come in as evidence legitimately, and in that manner operate as a bar to this application, it must be considered in that connection, and it is for this court to appraise its legal value herein.

Summarized, the contention of contestant is that the judgment of the orphans' court of Philadelphia, Pennsylvania, admitting the will of decedent to probate in July, 1901, is binding upon this court, as a judgment in rem concluding all the world. To support this contention contestant relies upon certain citations in the notes to *Bowen v. Johnson*, 73 Am. Dec. 53. I have read attentively these notes and the principal case, and I think the context fairly states the rule when it says that the probate of a will is unlike a judgment between parties subject to the jurisdiction of the court ren-

dering it, in this: that being but a decree in rem, usually passed upon constructive notice only, it is confined in its operation to things within the state setting up the court which takes the probate. It has been so treated in the country from which we derive our jurisprudence, and in general, at least, by the courts and legislatures of our own. "Full faith and credit" is given to it abroad, when the same faith and credit is given to it which it has at home; and that is that it is to be conclusive evidence of the validity of the will, as affording title to things within the jurisdictional limits of the court at the death of the testator, whether such title comes in contest within or without those limits; but, *de jure*, no evidence whatever of title to things not then within those limits. The clause of the constitution of the United States referred to was not designed to extend the jurisdiction of local courts, or to extend beyond its just limits the operation of a local decree; but to provide a mode of authenticating evidence of the record of a judicial proceeding had in one state, so that the proper general result of it might be conveniently attained in every other state, against persons and things justly within the range of the proceeding. Notwithstanding this clause, a judgment in a suit between parties is, as such, void out of the state, as to parties not personally served, and not appearing to defend within the state whose court renders the judgment; although if the suit be commenced by attachment of things within the state, it is, without such service or appearance, good as a judgment in rem against those things, to condemn them to satisfy the judgment. As little does this constitutional provision extend the jurisdiction of a municipal court of probate to things beyond the limits of the state which sets it up, and is quite satisfied, in our judgment, "with leaving the probate of a will where it finds it, a decree local in its nature and operation": *Olney v. Angell*, 5 R. I. 198, 73 Am. Dec. 62.

In this last cited case the same court said that it is old law that a will made in a foreign country and proved there must also be proved in England in order to dispose of personal property in England: *Lee v. Moore*, Palm. 163; *Tour-*

ton v. Flower, 3 P. Wms. 369; Vanthienen v. Vanthienen, Fitzg. 204.

Following this rule so early established and so fully carried out in the mother country, we apprehend it to be equally well settled by the decisions and legislation of the country that the effect of a decree proving a will, like that of a decree granting administration, is confined *de jure* to the territory, and things within the territory, of the state setting up the court. In their nature such decrees are decrees in rem passed by courts deriving all their authority from the state which institutes them, and, necessarily, in great part upon constructive notice only to those interested in the decrees; and it is difficult to see how a wider operation could be allowed to them, consistently with a just attention to the rights and claims, to the property of the decedent, of citizens of other states in which the property was at the time of his death. Whatever other operation is allowed to them is a mere matter of comity, which every state is at liberty to yield or withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its citizens: *Boston v. Boylston*, 4 Mass. 318; *Goodwin v. Jones*, 3 Mass. 514, 520, 3 Am. Dec. 173, *Parsons, C. J.*; *Pond v. Makepeace*, 2 Met. 114; *Doolittle v. Lewis*, 7 Johns. Ch. 45, 47, 11 Am. Dec. 389; *Strong v. Perkins*, 3 N. H. 517; *Kittredge v. Folsom*, 8 N. H. 111; *Ives v. Allyn*, 12 Vt. 589; *Woodruff v. Taylor*, 20 Vt. 65, 73; *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321; *Ward v. Hearne*, Busb. 184; *S. C.*, 3 Jones, 326; *Wilson v. Tappan*, 6 Ohio, 172; *Bailey v. Bailey*, 8 Ohio, 239; *Embry v. Millar*, 1 A. K. Marsh. 303; *Sneed v. Ewing*, 5 J. J. Marsh. 565, 22 Am. Dec. 41; *Darby v. Mayer*, 10 Wheat. 465, 469, 6 L. Ed. 367; *Armstrong v. Lear*, 12 Wheat. 169, 175, 176, 6 L. Ed. 589; *Vaughan v. Northup*, 15 Pet. 5, 10 L. Ed. 639; *Stacy v. Thrasher*, 6 How. 59-61, 12 L. Ed. 337; *McLean v. Meek*, 18 How. 16, 15 L. Ed. 277; *Story on Conflict of Laws*, 425, note and secs, 512-514a, and p. 431, note; 1 *Williams on Executors*, 204, note 1.

The legislation, we believe, of nearly all the states and certainly of our own, proceeds upon the supposition that such is the limited operation of a probate of a will had in a foreign

country or in another state; and provides some mode, in general analogous to that pursued in England with regard to a will which has received a Scotch probate, by which conclusive operation may be given to such a will within the state, full notice being given to all persons interested in order that they may appear and contest the validity of the same: R. I. Rev. Stats., c. 155, secs. 5-10; *Dublin v. Chadbourn*, 16 Mass. 433; *Laughton v. Atkins*, 1 Pick. 535; *Trecothick v. Austin*, 4 Mass. 34; Fed. Cas. No. 14,164; 1 *Williams on Executors*, 205, note, 1; *Story on Conflict of Laws*, sec. 513, and note 1, and cases cited.

We do not apprehend that article 4, section 1, of the Constitution of the United States extends to the operation of a probate of a will, as a judicial act of a state, beyond its own territory. "Full faith and credit" is given to such a decree when it is left where it is found, local in its nature and operation.

In Rhode Island, from which state the foregoing remarks are appropriated, application must be made to the court to permit the authenticated copy and probate to be filed and recorded. Notice must be given as in the case of an original application for probate. If no objection is made, or none in the judgment of the court sufficient to prevent it, the court shall cause the copy to be filed and direct it to be recorded, when "the filing and recording thereof shall be of the same force and effect as the filing and recording of an original will, proved and allowed in the said court of probate; but no such will is valid unless executed, subscribed and attested according to the local law." In Pennsylvania the foreign will, when a copy thereof duly authenticated is proved in that state, has the same effect as if it had been originally proved therein.

In California when a copy of the will and the probate thereof duly authenticated is produced by the executor or by any person interested in the will, with a petition for letters, the court must appoint a time for the hearing, of which notice must be given the same as for an original petition for the probate of a will.

If, on the hearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state: Code Civ. Proc., sec. 1324.

It has been shown conclusively in this case that the domicile of the decedent at the time of his death, and for a long period prior thereto, was in this city and state, and that he left personal estate therein, and in that case, it seems, this court is not bound to receive such a document as the Philadelphia record, to destroy its own title to jurisdiction. In such case it is doubtful whether such a record can be admitted at all in evidence, for it is said in the notes to *Bowen v. Johnson*, cited by contestant, that the original will itself must be produced in the court of the state where the actual domicile was at the time of his death; but however this may be, I cannot concur in the conclusion of contestant that the foreign record has the force and effect claimed for it by him on this application. It is not a bar to this proceeding.

As to the alleged will itself, it is claimed by contestant that the document bearing date the sixth day of April, 1901, is not the last testament of decedent; that he never signed or executed the same; that he was not of sound mind at the date thereof; that it was not signed in the presence of the alleged subscribing witnesses; that the statutory requirements were in no particular observed; that the signature of this paper is utterly unlike any of the exemplars in this case; none of the checks contains a signature so feeble in form or so lacking in characteristics as the one found on this paper; no satisfactory explanation has been given of the appearance and condition of this paper; it was mutilated in a manner not explained by the evidence. Contestant claims that decedent at the time of the alleged execution was thoroughly saturated with and sodden in liquor; he was a dipsomaniac; he was so diseased by the use of intoxicants habitually that his mind

and brain were incapable of intelligent operation. The competency of the mind must be judged by the nature of the act to be done; the act must be volitional, not merely mechanical. Contestant insists that the testimony of the witness Morgan Smith as to cutting the top of the sheet and the character and appearance of the paper indicate that it was tampered with; it may readily be seen how easy it would be to fabricate such a document; it is not difficult to understand the process by which this could have been manipulated; the appearance of alteration has not been adequately accounted for: Code Civ. Proc., sec. 1982; Schouler on Wills.

As to the signature of Max H. Kershow to the document, Carlton M. Kershow, the contestant, testified in his cross-examination that it was probably the handwriting of his brother, the decedent, although he had a doubt as to the terminal letters "ow"; but notwithstanding dissimilarities between this signature and those in the standards, the characteristics are the same, and it cannot be concluded on the evidence that decedent did not write his name on the paper propounded.

Whether decedent signed it intelligently or automatically is another question.

Whether the act was mental or mechanical, Max H. Kershow wrote his name on that paper.

The strictures of contestant on the appearance and condition of the paper itself and the doubts thrown upon the execution would not be too severe as matters of first impression; but in the light of all the evidence this court cannot find them finally justified.

We have the direct and positive testimony of Morgan Smith that he drew the will at the dictation of decedent on the evening of the 5th of April, 1901, and that on the next morning it was signed by the testator, and the attestation clause dictated by him and written by Smith, when the latter and Meadows signed as subscribing witnesses.

Smith swears that he went to the apartments of decedent on the evening of the 5th of April, 1901, at about 6 o'clock; dined there that evening with Mr. Kershow. Alice Kennedy also dined there but had her dinner separately; no one else was there but the waiter; Alice left at about 8 o'clock, ac-

according to the clock in the room; John Roland was not there at all that evening; at about half-past 9 or 10 o'clock decedent said to Smith, "Morgy, get some paper; I want to do some writing; I want to make my last will"; Smith got a tablet and made several drafts at decedent's dictation; this was between half-past 8 and 10 o'clock; he made a half a dozen drafts and tore them up; the decedent was trying to revive his law memory, he having been a law student in Harvard; finally Smith finished the paper in ink, on a piece of legal cap he had in his pocket among his insurance papers; then decedent said two witnesses were necessary, and they discussed names with reference to their fitness and their liability to keep their own counsel, at length settling on Meadows, and Smith went out to find him, and saw him but he could not come until next morning; Smith left Kershow's apartments at about a quarter or half-past 10 and returned at 1 o'clock and slept with him that night, arising at about 8 o'clock next morning, no one else being there; at about 9 o'clock on the next morning, April 6, 1901, Mr. Meadows came in; Mr. Kershow was awake and said to Meadows that he wanted him as a favor to act as a witness to his will; that it was a matter of the greatest secrecy, as if any of his folks knew he was about to make a will they would try to prevent him; he then read the will aloud, remarked on the misspelling of his brother's name with an initial "K," but said it would make no difference; he then said that an attestation clause was necessary; decedent first signed his name, then Smith took the document and added the attestation clause at the dictation of decedent; then at his request and in his presence and in the presence of each other Smith and Meadows signed their names as witnesses, decedent declaring it to be his last will and testament; Smith added the date in writing; on the evening before, while Smith was engaged in making the drafts, Kershow said that his law memory was rather bad but he thought he was able to draw his own will; Kershow was sober absolutely when he signed the will, as well as the night before when he dictated to Smith the terms of the instrument; he was sound in mind and acting of his own free will; after the execution Smith asked a waiter to

ring for a messenger and one appeared at about 11 o'clock, by whom he sent a message to A. B. Forbes & Son, the messenger returning in fifteen or twenty minutes with a check from them; Smith took the will and put it in his trunk in his room and kept it there until he moved to Sausalito, June 15, 1901, when he put it in his desk at the office in the Crocker building, where it remained until the day of the death of Kershow, when he took it to the office of Mr. Kowalsky and gave it to him; between the time of writing the will and the day of the death of the testator Smith swears he never spoke to anyone concerning the transaction. Smith testified that Roland was not at or in Kershow's rooms on the nights of the 5th, 6th and 7th of April, 1901; Smith remained there for several days because his eye had been injured and he thought it prudent to remain inside until the injury was repaired. With regard to the appearance of the paper Smith said he cut off the margin of the sheet on which the will was written—the left-hand margin—because ink had been spilled on it. Subsequently in his testimony he said that he divided the sheet of legal cap at the top by a knife held vertically and cut off the margins in the same manner; this he did before the occasion of writing the will; he did it in the insurance office; he had several sheets of legal cap which he used for making "prospects" of policies on; he had it in his left hip pocket with his insurance papers, and one day he took out the sheets and laid them on his desk upon which some one had spilled some ink and shoving the papers to the left side, not noticing the ink, the sheets became soiled, and some of them spoiled, and he cut the margin of some to save the paper; that is how this particular half-sheet became cut on the left margin; Smith did not know where he obtained the legal cap originally, it might have been in Gamage's office, which he sometimes visited—the office of Jules C. Gamage, the collector.

Meadows sustained Smith as to what occurred at the time of the transaction, and declared that Kershow was perfectly sober on that occasion and drank nothing during that time and was sound in mind.

It may be said that the witnesses, except the parties and the witness on the stand, were excluded from the courtroom during the taking of testimony.

As against these subscribing witnesses the contestant relies on Alice Kennedy, maid-servant, and John Roland, manservant, of the decedent, to show that the story of the drafting and execution was absolutely untrue, and impossible because neither Smith nor Meadows was there on the occasion sworn to by them, as John and Alice were there all the time and knew all the facts.

Dr. Wagner's evidence is also relied upon to demonstrate that the condition of the decedent was incompatible with soundness of mind at the date of this document; that he was so debilitated in mind by his habits of drink that any manual action was automatic and not responsive to intellectual impulse. Contestant maintains that the doctor's observation was acute and constant and friendly, sympathetic and accurate.

Roland testified that he was in the service of decedent for two years, serving him at night, and that he was with him in his apartments all the time at night; he reported at 6 o'clock and then went to dinner and came back at 8 o'clock and remained all night; Alice was there during a part of each night; from the 1st of April to the 24th of April, 1901, decedent was in bed all the time; Roland saw Kershow nearly every day for two years and believed he was unsound in mind in April, 1901; on the night of April 5, 1901, decedent was very wild in mind, he had visions; he was not then of sound mind; this condition lasted some four or five days; during that whole night the mental condition of decedent was unsound; when Roland left on the morning of the 6th at about 8 or half-past 8 o'clock Alice Kennedy was there; Roland went there at 6 o'clock in the evening and reported and came back at 8 and washed decedent and then went away and returned at 10 o'clock and remained all night; hypodermic injections were given to decedent about every night, usually about half-past 9 o'clock; in the daytime Roland worked for Dr. Wagner; from the time Roland went into Kershow's room on the evening of April 5, 1901, until he left

on the morning of the 6th no one came in there except Dr. Renz.

Roland testified that he gave Kershow whisky whenever he wanted it, whether he was insane or drunk; he sometimes put water into it, decedent always drank water after his whisky; it is a fact that he could not keep the whisky on his stomach. On the occasion of decedent's birthday there were present Ada Thall, Alice Kennedy and Roland; no one else was present at that time. Roland testified that his first check from decedent was at the Maison Riche; it was for \$20; the second check was at Tortoni's for \$15; this was the only check decedent gave him at Tortoni's; that was in 1901; Roland swore that he could not be mistaken about that, only one check at Tortoni's. Two checks were exhibited to witness and the indorsement identified as written by him: "John E. Roland," checks dated March 29, 1901, for \$23, and May 21, 1901, for \$10. At these dates decedent was living at Tortoni's; Roland said that the decedent was always drunk when he was with him; when he wrote those checks he was drunk, under the influence of whisky, in a mild form; decedent was in bed when he wrote those checks. When decedent made up his mind to do anything, Roland said, he always did it. Morgan Smith was seen by this witness dining at Kershow's rooms more than twenty times in 1901.

Alice Kennedy worked for decedent at the Maison Riche and at Tortoni's; he was drunk all the time at the Riche and the same at Tortoni's; he drank constantly; his favorite was Hunter Rye Whisky; he drank also beer, absinthe, and white wine; he was of unsound mind; from the 1st of April until the 24th he was unable to go out at all; Morgan Smith was not in that room during all that time and she never saw A. J. Meadows. On the 5th and 6th of April, 1901, decedent was of unsound mind; on the 7th he was a little better, his mind was a little more settled, not so flighty; there was a person called Ada there for some time at times; her name was Miss Ada Thall; she was there on his birthday, the 24th of May, as near as Alice could remember; she was there on the date that Alice went to the steamer with Miss Gettings;

came there two or three days before Kershow's birthday, and remained until the day before he died, when she was sent home. It is in evidence that Miss Gettings left for China May 29, 1901. Alice said she never knew Mr. Morgan Smith to do any writing for Mr. Kershow; decedent told her at the Maison Riche that his birthday would be April 24th; he told her also at Tortoni's; on both occasions he told her before his birthday had arrived; at the Maison Riche he drank absinthe, beer, wine, whisky, mainly whisky, that was his favorite, but he could not keep it on his stomach, which was burned out. Alice sometimes put water in, but he was very cute about his whisky, one could not fool him on that; at Tortoni's he drank more whisky than at the Riche; he was liberal with his liquor—everybody that came had a drink; the effect of the liquor was very bad on him the whole time at Tortoni's; he was a very friendly gentleman, indeed; he was a lovely man; he would join in the conversation with John and her. One day was very much like another at Tortoni's, no great variety. John Roland used to come in at about 6 o'clock in the evening and would remain for dinner; John and Alice would have dinner there together; they would be so engaged at the table until about half-past 8, not always eating but it would take some time to obtain dinner after ordering and they would sit there talking and Mr. Kershow would engage in their talk, would joke and laugh; he was very sociable, liked company and liked to entertain his friends; he sometimes imagined he saw things, would get up and hunt around, and Alice would ask him, "What is the matter, Mr. Kershow?" and he would say, "Is that you, Alice?" and say he thought somebody was there, and she would say "No," and lead him back to bed; he would recognize her. Alice testified that April 7th of this year (1901) was on a Saturday, and that the mental condition of Kershow was about the same on that day as the day before, he was a little better; she afterward corrected her statement as to the date and said she was in error when she stated that the 7th of April was a Saturday; it was Sunday—Easter Sunday—there was not much change in him on that day; he was about the same, a little flighty at times; she could not remember

anything particular he did from day to day; he would keep on drinking, sometimes he would brace up a little and say he wanted to write to his brother, the "Kid," as he called him, whom he wanted to come and straighten out things, as he had run so far behind in his affairs; then he would resume his habit of drinking; Alice never saw Morgan Smith do any writing in Tortoni's; in the Riche he used to come in and ask for a piece of paper and sit down and scribble off something, a letter to his friend, he would say, and then leave. At the time Jule Gamage came to see her at her flat he asked her to go in with the will and she would have a thousand dollars; she told Gamage that Mr. Kershow did not leave any will except the one he gave to Mr. Michael; he made no will while she was there and she was there with him all the time. Alice said that Getz's barkeepers did not dine there. At the time Alice was being interrogated as to dates she was observed consulting a card hidden behind her satchel, which, upon demand of counsel for respondent, she revealed, saying that it was a card with her name, Alice Kennedy, and written upon it, "Born: Aug. 16th, 1867. Married, June 5, 1900." This was on the obverse side, referring to her birth and marriage; she stated that she had in her satchel this card and had looked at it during her testimony as to dates; it was in her husband's handwriting, except the figures "1899" on the name side, which were written by her.

Dr. Henry Louis Wagner testified he knew the decedent when he was living at the Palace Hotel and the Maison Riche; he had to refer to his visit-books to refresh his memory as to dates of professional visits; he saw the decedent on the 5th, 6th, and 7th of April, 1901, at Tortoni's and also on the 4th and 8th of April; the entries in his books were of purely professional visits; the witness was there thirty times in April and always saw Alice there; he was never there after 10 o'clock in the evening; sometimes his "man" Roland would be there. The doctor knew decedent since 1899; he visited him at least fifteen times during the month of April, 1901, socially, as a friend, in addition to his thirty professional visits in that month; at least every second day he called upon him in a social way; the doctor spoke to him

upon a variety of subjects; decedent frequently asked the doctor's advice upon matters unconnected with his ailments; he had called at the doctor's office to speak to him upon other matters. The doctor first formed decedent's acquaintance in April, 1899, on a professional visit. Dr. Wagner formed an opinion as to Kershow's soundness of mind in April, 1901, based upon observations in his social visits apart from information acquired by him as necessary to prescribe; in the opinion of the doctor the decedent was unsound in mind; he had hallucinations. Dr. Wagner testified he was a surgeon and made a specialty of surgery of the head, neck, throat, and brain, but was not an alienist. The decedent was addicted to drink; the witness treated him for various troubles, an infraction of the skull; a wound over eye; ear troubles, and inebriety. In cross-examination Dr. Wagner further testified that in the visits made by him to decedent he remained often from fifteen minutes to two hours; he often went to visit him in a friendly way in March, April, and May, 1901; decedent was in a stupor frequently and incompetent to intelligently interpret or intelligibly communicate his ideas; in fact, decedent was mentally incompetent. Dr. Wagner testified that decedent drank a great deal; Kershow was originally a bright man, of good instincts, who had when he came to San Francisco two and one-half years ago, streaks of brilliancy and inspired hopes of cure, and the doctor had some confidence in his reclamation; he became greatly interested in him, took a friendly interest in him; at the beginning the doctor tried hard to convince decedent that he should cease drinking; his arguments were unavailing, however, and when Dr. Renz took charge of the case Dr. Wagner gave up his efforts and told Dr. Renz that he might try his own theory. Dr. Renz thought he might effect a cure by hypnotism and by injections of strychnia, but Dr. Wagner became disgusted with his own ill-success and so quit his efforts in that direction; by unsoundness of mind Dr. Wagner meant where a man has lost his reasoning powers; Mr. Max Kershow had strong will power. A letter written in pencil by Max Kershow to his brother Carl, dated May 21, 1901, about bill of Dr. Wagner, was shown to this witness;

in reference to this letter the doctor said that he had written out his account or bill some time previously, and subsequently sent his man Roland to collect it. In the opinion of Dr. Wagner, Mr. Max Kershow was devoid of reason during March, April, May, and June, 1901; decedent may have had reasoning power and yet have been at the same time unsound in mind; at the minute he wrote that letter he may have had reasoning power; the doctor discussed business with decedent in 1900; decedent was very suspicious in everything he did and in every transaction; small in every possible way.

The letter shown to Dr. Wagner is as follows:

“San Francisco, May 21, 1901.

“My Dear Carl—

“Dr. Wagner wrote to you about his bill and I must have same way of paying it off, also that of Dr. Renz which will be surely as large. Can you not find out what my balance at the Trust Co. is and telegraph the amount to me at Palace Hotel. The Maison Riche closed and I have been living at Tortoni's for some months. My dear Carl, I am compelled to have some money to live on, as I only have a small sum at present (about \$50.00) and I want you to consult with Uncle Harry and dispose of a piece of my interest in Denver. You of course can buy it out. I will have Mr. Michael make out a power of attorney for you and you can give me a certain sum as an allowance, until I am myself again. It would be much more satisfactory if you could come out here but I suppose that is not convenient for you. At least find out my balance at Trust Co. and telegraph it to me as I must have the money at once. I have not written to you for the reason that I have been so sick that I could not. Dr. Renz has just kept me alive. He wants you to come out.

“Your brother,

“MAX H. KERSHOW.

“I enclose check so you can draw out balance.

“MAX.”

At the minute he wrote that letter, Dr. Wagner says, the writer may have had reasoning power; he may have had

reasoning power and yet have been unsound in mind at the same time. The doctor had previously said in his testimony that by unsoundness of mind he meant where a man had lost his reasoning powers and that in his opinion Max Kershow was devoid of reason during the four months of March, April, May, and June, 1901—and it was during this period that the letter hereinbefore inserted was written. This letter was a continuous performance, which must have occupied its writer for several minutes; in fact, it must have approximated fifteen minutes in its composition and execution.

Dr. Wagner's testimony was taken under objection, on account of his professional relation to decedent, and it is difficult indeed to separate his professional from his social relation, but his idea of his patient's soundness of mind may be considered here in connection with the accepted definitions.

By the mind of man we understand that in him which thinks, remembers, reasons, wills. Will, memory, and understanding are usually denominated the constituents of the mind. The principal faculties of the human mind are called, respectively, the understanding and the will. A person is of sound and disposing mind who is in full possession of his mental faculties, free from delusion and capable of rationally thinking, acting, and determining for himself.

Lord Chief Justice Cockburn, in the course of his opinion in *Banks v. Goodfellow*, said: "Everyone must be conscious that the faculties and functions of the mind are various and distinct as are the powers and functions of the physical organization. The instincts, the affections, the passions, the moral sense, perceptions, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind."

In considering testamentary capacity in the same case, he said further: "It is essential to the exercise of such a power that a testator should understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind should poison his affections, pervert his sense of right, or prevent

the exercise of the natural faculties; that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. This is the measure of the degrees of mental power which should be exacted."

Maudsley, in his work on Responsibility in Mental Disease, says that this decision of the court of queen's bench, which practically is that an insane man may sometimes make a sane will, agrees so far with the older decisions as that the will itself, if appearing to be a rational act, rationally done, was held to be evidence of a lucid interval.

What is a "lucid interval"? Dr. Wagner had not heard of the term before the trial of this case; the institutions in which he had been instructed had not comprised in their curriculum the study or treatment of diseases of the mind, and, while the doctor is an eminent surgeon and distinguished in his specialty, he does not profess to be an expert in alienism, and did not seem to comprehend the phrase "lucid interval" until it was explained to him as a period of mental clearness enjoyed by an insane person, during which he is capable of performing an act binding in law; it is an interval during which the patient is restored so far as to be able, beyond doubt, to understand and to do the act, with such reason, memory, and judgment as to make it legal. In the opinion of Dr. Wagner, Kershow enjoyed no such interval for the four months during which he wrote the letter of May 21, 1901, and is said to have dictated and executed the paper here propounded as a will dated April 6, 1901, which may be here inserted as follows:

"I, Max H. Kershow, being of sound and disposing mind, declare this to be my last will and testament, hereby revoking all former wills by me made. I give and bequeath to my brother Karl \$5,000.00 to each of my uncles, J. Henry Kershow and P. Kershow \$1,000.00, to my servant Alice Kennedy, \$1,000.00, to my friend J. Morgan Smith \$500.00. The rest of my estate real and personal wherever situated, after paying the above bequests and my just debts, I bequeath to my sincere and devoted friend Rhea Gettings.

"I nominate and appoint as one of my executors of this my last will and testament Hall McAllister together with Rhea Gettings as executrix without giving bonds.

"MAX H. KERSHOW.

"We, J. Morgan Smith and A. J. Meadows, have signed our names as witnesses to this the last Will and Testament of Max H. Kershow at his said Kershow's request and in his presence and in the presence of each other.

"J. MORGAN SMITH.

"A. J. MEADOWS.

"April the sixth nineteen hundred and one."

At the time Kershow wrote that letter he must have been in possession of his faculties; it was a rational act, rationally done; all the mental processes are there carried forward logically and relevantly; he shows an appreciation of the magnitude of the physician's charges and an apprehension based upon that account of as large a bill from the other physician, and a desire to provide for a discharge of the indebtedness; he wishes to be advised of the balance at his bankers in the east, knows the amount he has on hand locally, advises a consultation between his brother and his Uncle Harry as to a sale of property in Denver; intimates that his brother can make the purchase himself; says that he will have his attorney make out a power for his brother who can then give him a certain sum as an allowance until he is himself again; says it would be much more satisfactory if his brother could come out here, but supposes that it is not convenient; again requests that he ascertain the balance at the bank and telegraph it out as he must have the money at once; gives a reason for not writing because of his sickness; says that Dr. Renz has just kept him alive and that the doctor wants Carl to come out; subscribes himself dutifully and with his full name, adds a postscript inclosing check so his brother could draw out balance.

In this letter the writer seems to have been able to intelligently interpret and intelligibly communicate his ideas. It can scarcely be said, as a responsible utterance, that the writing of that communication was a manual act, purely automatic and not responsive to intellectual impulse. Every element en-

gaged in the definition of a sound mind enters into the structure of that letter. The letter speaks for itself and needs no further comment. Whatever the writer's condition at other times may have been, this letter must have been produced during a lucid interval; but the doctor says that decedent may have had reasoning power and yet have been unsound in mind; this statement imports a contradiction in terms, as does the statement that decedent had strong will power and yet was unsound in mind.

Dr. Wagner's own testimony shows that when the man was sober he was sane; for the doctor spent hours with him socially, argued with him over his prevailing vice without avail; had conversations on business with him in which the doctor discovered that decedent was very small and suspicious in everything he did and in every transaction. It appears that in one affair the doctor and decedent differed widely as to the value of a ranch which the former desired to dispose of to the latter; decedent thought the price too great and it was not the kind of a ranch he wanted and he declined to purchase; this seems to signify sanity rather than the opposite; in this he seemed to have been capable of rationally thinking, acting and determining for himself as to the value and character of the property, and it appears that the doctor by his negotiations, conversation and acts was willing to deal directly with decedent in so important a matter.

It appears, then, from the doctor's own statement that at times the decedent had reasoning power, a strong will, and a sense of property values; he knew what he was about and, as John Roland, "the doctor's man," and the man-servant of decedent testified, when Max Kershow made up his mind to do anything, he always did it.

It appears from the testimony of the doctor's man that the decedent had a stubborn spirit; the doctor said he had a strong will and a suspicious nature; they both agree that he was of unsound mind.

Alice Kennedy was of the same opinion as to soundness of mind, but testified that decedent was a liberal, kindly disposed man, a very friendly gentleman; "a lovely man," sociable, generous in the entertainment of his friends, the

soul of hospitality, fond of jest, agreeable in conversation, joining before and during the dinner hour in genial talk with her and Roland, joking and laughing, and making his pleasant presence felt by everyone—servant as well as guest; and yet he was drunk all the time at Tortoni's and of unsound mind and unable to leave his room from the 1st of April to the 24th of that month by reason of his condition.

With reference to these two witnesses, John Roland and Alice Kennedy, it may be said that there are frequent infirmities in their testimony which weaken its general effect. There are contradictions from within and without. Roland is contradicted in an important item by his employer, Dr. Wagner, with respect to the time of arriving in the morning at the doctor's office; he is also contradicted upon a vital point by Alice as to the time when he came and went on the 5th of April, 1901; she swears she asked Roland to come early on April 5, 1901, because she wanted to go somewhere; she asked him the day before, he did not come and she did not go anywhere else; she remembered the event and the evening because it was the eve of her child's birthday; but their tales of the time of coming and going do not tally; they are diametrically opposed and cannot both be true. Alice Kennedy's memory as to dates was more than imperfect; even when her testimony as to dates was shielded by the card concealed within or behind her satchel on the witness-stand, she was uncertain; without the memoranda she was helpless as to dates of important incidents and occurrences in her own career; her recollection in this respect was untrustworthy; her evidence in her divorce suit against her first husband Green does not comport with what she said on this trial as to dates; the discrepancies are too great to be ignored or excused; she contradicted herself in many essential particulars as to events in her own life which should have fastened themselves imperishably on her memory; how, then, can she expect to be accepted with reference to matters with which her connection was collateral and of inferior importance to those of her domestic personal concern?

Roland and Alice are contradicted with reference to Morgan Smith's presence at the rooms of decedent in April, 1901.

Moses Getz, the saloon-keeper, testified that he visited Kershow nearly every day in that year and in that month at Tortoni's, and that nearly every time he saw Smith there. Getz said that decedent was careful in business matters, although he spent money freely at the saloon; opened wine to the extent of \$150 a night at times; this witness lent money to the decedent as high as \$100 at a time, amounting sometimes in the aggregate to \$400 or \$500, all paid back; decedent always paid his debts; Getz remembered that in April, 1901, decedent had his birthday and induced the witness to let his barkeepers go up to dinner with him at Tortoni's, Getz remaining at work in their place; they came back at about 9 o'clock with some cake which they said was birthday cake, and Kershow followed soon after; this was in the latter part of April, 1901. Getz thought the decedent was sound in mind, basing his opinion on observation and conduct. The barkeepers, Simmons and Crayton, testify to visits to Tortoni's and to the dinner spoken of by their employer. Simmons swore that he often visited Kershow at his rooms; decedent frequently invited him to dinner and they dined together at Tortoni's; Alice Kennedy and John Roland, the maid and the man, were usually present; on decedent's birthday in this year Simmons had dinner with decedent at these rooms; there were five persons present—Mr. Max Kershow, Alice Kennedy, John Roland, William Crayton, and this witness; Simmons believed that a young lady, Ada Thall, partook also of the dinner; the rooms at Tortoni's comprised a dining-room, bedroom, and bath; decedent sat at the table set in the dining-room; he was not drunk; he showed what he got for his birthday: cake from the proprietor, flowers and old Spanish wine; Simmons remained there from 6 to 9 o'clock that evening, when he returned to his work, leaving Crayton behind; Simmons went on duty until 12 o'clock, but did not see decedent again that night; from his acquaintance with Kershow he thought him of sound mind; decedent was oftener sober than drunk.

Crayton, the other barkeeper, corroborated his associate as to the birthday dinner party and added that after Simmons left there he remained until about a quarter to twelve mid-

night; when Crayton left Tortoni's he was accompanied by Kershow and the man-servant Roland; they went down to the Manhattan saloon together; previous to that night and in the same month Crayton had seen decedent in that saloon on two or three different occasions; from what this witness saw of him he thought Max Kershow was of sound mind; Crayton had seen Morgan Smith in the rooms at Tortoni's two weeks before Mr. Kershow died; Crayton says that when he saw Kershow he was sometimes sober and sometimes under the influence of liquor; three or four times the witness saw him when he was absolutely intoxicated. Alice Kennedy swore that these two barkeepers, Simmons and Crayton, did not dine there on the birthday, although on the evening of that day Henry Simmons brought a bunch of flowers to Kershow.

The date of the birthday of decedent is fixed by the evidence as April 24, 1901, which was Wednesday.

Alice reiterated that neither of the barkeepers was there at dinner on that occasion, and that those who partook of the meal were decedent and the girl Ada, John Roland, and herself; Simmons did not stay for dinner; he just came in with the flowers, left them, and went out again.

The story of Alice as to the visit of Jules Gamage to her on the morning of Max Kershow's death is contradicted by Gamage, who declares under oath that he did not call at her house nor on her on that morning nor on the next, nor did he have any conversation with her on either of those occasions or days at her house or elsewhere, or at any other times, and never said anything to her about a will or that she should get \$1,000 by the will, or that she ought to call on one of the attorneys; Gamage did not see nor converse with her on that topic, and he did not even know at the time she alluded to of the death of Kershow. It appears that decedent died at fifteen minutes after midnight, and none of the witnesses for the proponent knew of the decease until long after the hour at which Alice swore that Gamage called to see her and made the proposition that she rejected.

Max H. Kershow was a man of honor, in his way; he was mindful of his financial obligations, and inclined to be

punctilious as to their discharge to the last penny; he may have wasted much on wine and women, but, if we are to accept Dr. Wagner's estimate of his character, he was otherwise a cautious, prudent business man, for such is the deduction from the doctor's declaration that decedent was a suspicious and a distrustful person, who never paid out a dollar without a doubt or demur. He was evidently anxious, however, for he adjured his brother Carl to provide for the extinction of outstanding liabilities; among others certain notes to one Friedman. Carlton Kershow testified that Max said he would be glad if Friedman was paid, and upon that suggestion Carlton paid the notes; Carlton was at his brother's room about four or five days before the death when Friedman called there; Friedman suggested to Max that he owed him a certain amount, and Max asked Carl to fix it for him, \$161 approximately; Carl paid before the death.

Carlton also paid some I O U's for his brother after some talk between them; the payment was made in his brother's front room. Carlton had previously in his testimony, some ten days before, giving an account of these transactions, expressed his belief that by reason of his habits his brother Max was out of his mind; Carlton believed that Max was insane as the effect of continued indulgence for years in intoxicants and narcotics, and he said that his brother was constantly under the influence of drugs or intoxicants for the last two weeks of his life, and that morphine was administered to him hypodermically by Dr. Renz.

Dr. Renz was not examined as a witness in this case, it appearing that he was obliged to go abroad abruptly without affording an opportunity to take his deposition.

It was during these two weeks during which Carlton Kershow testifies that his brother was constantly under the influence of liquor and drugs, out of his mind, insane, that the decedent requested his brother to pay Friedman and arrange for the payment of the I O U's.

Alice Kennedy admitted that she knew a Mr. Friedman, a jeweler on Stockton street; "he visited Mr. Kershow once or twice."

What does Mr. Friedman say on this subject? Ralph Friedman testified that he was forty-two years of age, a

dealer in diamonds and jewelry at 25 Stockton street; knew the deceased, Max Kershow, who lived for a while at the Maison Riche; Friedman sold to Kershow diamonds to the amount of \$275; sold him a sunburst and a silver cigarette-case on Christmas Eve, 1900; decedent was then staying at Tortoni's; witness had dealings with him in the year 1901; advanced him some money; decedent sent for witness and he went to the rooms at Tortoni's; decedent was in bed and asked witness if he would lend him \$100. Friedman said "Certainly," and let him have that sum, for which he gave his note; subsequently Kershow directed Friedman to let Miss Gettings have \$50, and witness did so, taking his note for that; afterward witness was repaid by decedent's brother in the rooms of Max Kershow at Tortoni's, the brother Carlton in one room and Max in the other. Friedman let Max Kershow have the \$100 in the latter part of April or first part of May; the notes were paid about five or six days before he died; five or six days before the payment Friedman heard that decedent wanted to see him and he went to the rooms at Tortoni's; there were present Mr. Max Kershow in bed, his brother, whose name witness did not then know, and Alice Kennedy, the maid; Mr. Max Kershow asked Alice to step out into the next room, as he had some business with witness; she went out and Max Kershow then said to his brother, calling him by name, that he owned witness \$100 and \$50 on two notes, and \$4 for a nugget, which he wanted paid; the transactions of witness with Mr. Kershow were personal; he took no collateral for the loans; the \$50 matter was in May; Friedman was frequently in the rooms of Kershow in Tortoni's; he was there in each month in 1901 prior to the death; sometimes he saw decedent every day for a while and sometimes two or three weeks may have elapsed; he spent as much as half an hour at a time with decedent; Kershow would be smoking and drinking at times; in the opinion of Friedman decedent was of sound mind and sober when he saw him; the opinion of his soundness of mind was based upon the observation of decedent and his capacity for transacting the business witness had with him; Kershow was very careful in those affairs.

Alice Kennedy and John Roland concur in the statement that from the 1st of April until the 24th Kershow was unable to go out at all, and that Morgan Smith was not in that room during all that time, but Abraham Strauss, a cabman, testifies that on the 11th of April, 1901, he took Mr. Kershow from the Manhattan Saloon, 25 Geary street, to Tortoni's; there was a gentleman with him, Morgan Smith, and a lady, whom the cabman did not know; Strauss was called twice on the 24th of April, 1901, once on that day called to Tortoni's to take Kershow and a lady and a colored man to the Manhattan; Miss Gettings was not the lady on that occasion. Strauss knew Max Kershow two years, and saw him perhaps five nights out of seven in that time except when decedent was sick, and from his contact with him the cabman thought decedent was of sound mind. Kershow paid the cabman for the rides except the last one, which was paid for by his brother; the witness had with him on the stand his book to refresh his memory showing the dates of those rides.

Contestant's counsel says that the cabman Strauss evidently manipulated his memorandum-book, but, while the memoranda are crude and inartificial, the court is not convinced that they were concocted or manipulated. Strauss was to Kershow's rooms at Tortoni's many times; the number was 21 on third floor; when he took decedent home it was in the evening of April 11, 1901; it was between 7 that night and 1 the next morning. Strauss was in business for himself, hiring his own coupé, having headquarters at the southwest corner of Grant avenue and Geary street, and his hours were between 6 at night and half-past 5 in the morning. Kershow was generally full when the cabman took him in his coupé; he was more times sober than drunk; on the 24th of April, 1901, the first time that day Kershow was alone when Strauss took him from the Manhattan, the second time Morgan Smith and a lady were with him.

On one of these dates, April 11, 1901, that the cabman testifies that he took Kershow from the Manhattan saloon to Tortoni's in company with Morgan Smith and a lady, there appears to have been written and signed by decedent a check on a blank form of the Crocker-Woolworth National Bank

for three hundred dollars (\$300), payable to "Cash" or order and canceled with the bank stamp as paid on that day.

Concerning this check, Morgan Smith testified that he was present when decedent made it out and signed it; he accompanied Kershow to the bank from the rooms at Tortoni's, where Smith had been sojourning with decedent; the two walked together to the bank, Kershow being feeble on his legs and his companion assisting him along; they stopped on the way down at the lower Louvre saloon to take a glass of beer and then resumed their walk to the banking-house two blocks below, on Market and Post streets junction, the Crocker building; they entered the counting-room and decedent went to a standing desk near the window, took out a check-book from his pocket, made out the check, went to the teller, received the cash and left the bank. At this time Kershow was absolutely sober, having taken nothing except the glass of beer. If Alice Kennedy and John Roland spoke the truth as to Kershow's continuous confinement in his rooms from the 1st to the 24th of April, 1901, Strauss and Smith swore to falsehoods concerning the incident to which they testified as occurring on April 11, 1901.

Some circumstances seem to incline the balance against Alice and John when their testimony is weighed against the main witnesses for proponent. The documentary evidence of the numerous checks drawn by decedent in the period from April 1st to 24th, 1901, when they testify he was constantly drunk, "drunk all the time," would seem to imply that he must have been to some extent in his senses, sufficiently so to understand that he had a balance at his bankers against which he could draw efficiently. On April 1, 1901, he drew a check payable to S. Constantini or order for \$50; on April 11th, the check already alluded to for \$300; on April 16th, S. Constantini or order for \$50; on April 18th, same person or order, \$50; on April 19th, same order, \$25; again on April 19th, M. J. Getz, or order \$25; six checks in all filled out and signed by his own hand.

It is idle to say that such acts were entirely automatic; they were the offspring of an intelligent design; he certainly must have known what he was about when he carefully filled in the spaces with the true date at the top, the accurate name

of the payee in its proper place, the amount in numerals with the fractional signs duly noted, the amount repeated in writing followed again by the fractions and subscribed with his name in full. His memory was in better form than that of Roland, who swore that the decedent gave him but one check at Tortoni's in 1901, and that he could not be mistaken on that score; only one and that for \$15; and yet two checks were produced and identified by this witness bearing his indorsement and neither of them for the amount of \$15, but for \$23 and \$10, and respectively bearing date March 29, 1901, and May 21, 1901. Roland swore that Kershow was always drunk when he was with him; he was drunk when he wrote those checks and in bed. Be it remembered that it was on the date of the second of these Roland checks, May 21, 1901, that Kershow wrote the letter to his brother Carl about the doctor's bill and other financial matters.

As against the testimony of Alice Kennedy and John Roland that Morgan Smith was not in Kershow's rooms on the night of the 5th or the morning of the 6th of April, 1901, there are corroborating circumstances and evidence to support the statements of Smith, who testified that he sent a message on that morning to his employers by a district messenger, as he did not want to emerge from the seclusion of those apartments on account of an injury to his eye and he wanted some money; he remained inside for several days on that account, and on the morning of the 6th he wrote a letter to A. B. Forbes & Son, and transmitted it through the messenger, received in reply on the same day a check, which was cashed by Caley and Roeder, saloon-keepers, on the corner of O'Farrell street and Grant avenue, on the 8th of April, 1901, the intervening date, the 7th being Sunday. As to this circumstance in corroboration of Smith we have the evidence of one of the proprietors of the messenger bureau, 294 O'Farrell street, William K. Lewis, who produced his books and the ticket or "tag" of a message sent out from his office April 6, 1901, which contained memoranda written by this witness, indicating that at 10:30 o'clock on that morning he sent out a message to 111 O'Farrell street, Tortoni's, by a messenger, No. 33, who returned at 11:10; Lewis gave the tag to the messenger, one Arthur Wil-

son, and received it forty minutes later from the same person. Arthur Wilson testified that was twenty-two years old, now an elevator boy, but in April, 1901, he was a messenger for the California Special Messenger Service; he received a call for Tortoni's, and went there and got a message from a man, whom he identified in court as J. Morgan Smith; it was between April 5 and 7, 1901, just after payday; the man had on a bathrobe, had a black eye, light red hair, smooth face; Wilson took the message to corner California and Montgomery streets; Wilson wrote on the tag in pencil after he returned to his office the words: "California and Montgomery Order": The tag reads as follows:

"No. 8490.

April 6, 1901.

"California Special Messenger Service.

"111 O'Farrell Street.

| Messenger. | Out. | Returned. | Occupied. | Carfare. | Total |
|------------|-------|-----------|-----------|----------|-------|
| 33 | 10:30 | 11:10 | 40 | | 20 |

"California and Montgy.

"Order."

When Wilson went to Tortoni's he entered the bedroom, waited there ten minutes for the man to write a letter; there was a woman there, colored, whom Wilson took to be a matron from her wearing a cap; he saw no one else there.

Stanly Forbes testified that he was the junior member of the firm of A. B. Forbes & Son, 222 Sansome street, corner of California street; their office was at the same place on the 6th of April, 1901, when he received a letter which he identified and which reads as follows:

"A. B. Forbes & Son, City.

"Dear Sirs:—

"Having been ill for a couple of days now and unable to get out and down town I ask if you may send by the returning messenger my advance, this being the 6th of the month. Being incapacitated so I am placed in rather embarrassed condition and I am greatly in need of the funds otherwise I would wait until I were again on my feet.

"Very respectfully,

"J. MORGAN SMITH.

"April 6, 1901."

That letter came from J. Morgan Smith, and in response to the request therein contained Forbes sent the firm check for \$30, which is as follows with indorsement:

“San Francisco, Cal., Apr. 6, 1901. No. 28381.
 “The Bank of California,
 “Pay to the order of
 “J. Morgan Smith. \$30†
 “Thirty†.....Dollars.
 “A. B. FORBES & SON.
 “The Bank of
 “Paid
 “Apr. 8, 1901.
 “California.
 “(Endorsements):
 “J. MORGAN SMITH.
 “CALEY & ROEDER.”

The letter was handed to Forbes over his desk and he read it and wrote check and sent it by the same messenger to J. Morgan Smith.

The messenger located the office of Forbes and Son erroneously at California and Montgomery streets, whereas it was in the Mutual Life Building, on the corner of California and Sansome, one block distant.

Are Smith and Meadows to be believed? Is their story of the execution of the paper here propounded for probate probable? What is the evidence to challenge the veracity of their narrative?

At the date of the alleged will, decedent was about twenty-nine years old, he having been twenty-eight in the July previous, according to the statement made by himself to the registrar of voters:

“No. 21563. Original. Affidavit:
 “Name in full: Max Howard Kershow.
 “Age: 28 years. Height: 5 feet 8½ inches.
 “Residence: Maison Riche, 44 Geary street.
 “July 19, 1900.
 “Subscribed and sworn to before officer by
 “MAX H. KERSHOW.”

He had been well educated, having received his preparatory instruction at Ogontz, near Philadelphia, and pursuing a full course at Yale College, where he was graduated, and whence he went to Harvard Law School, spending two years in that institution. It will be seen that he had enjoyed exceptional advantages of intellectual education. In addition he had athletic tastes and training, and achieved the distinction of amateur champion of the world in pole vaulting. Other species of sport also had attractions for him, and gradually he was weaned from the higher life of the intellect and became addicted to habits and associations foreign to his natural and inherited conditions and influences, yet he never lost entirely his primal traits of character, although their growth and development were apparently arrested by the forces and influences surrounding him in his changed course of life.

Drifting into life along the line of sensual indulgence, he gradually lost his health and found his way to California in the fall of 1898, in an endeavor to repair his wasting strength and restore the vigor of his constitution. He found the climate congenial and with the exception of a trip to Honolulu for six weeks he made here his home. He lived first in the Palace Hotel, afterward at the Maison Riche, and finally took up his abode at Tortoni's tavern or lodging-house and restaurant. Part of his time he spent also in the southern portion of this state, which he found suited to his disposition, lauding highly the country around about Los Angeles in his letters from that section. In this city, in the year 1899, he made the acquaintance of proponent at a certain resort in which she was a resident; according to her recital their acquaintance began at that house where an accident occurred to him through his falling downstairs, cutting his eye and nose, she attended him and the friendship thus commenced continued until his death; they went to Honolulu together, he buying the tickets, and he introduced her on the steamer as Mrs. Kershow; they returned on the same steamer, the "Australia," in about six weeks and went to live at the Maison Riche restaurant.

The testimony of William Dresbach, ticket agent for the Oceanic Steamship Company, in a measure confirms proponent's statement as to the Honolulu trip. Dresbach pro-

duced a ticket which he said was sold by him on December 11, 1899, to the person signing on the side "M. H. Kershow." Dresbach did not know him personally, did not know his identity apart from the transaction; the writing "M. H. Kershow & wf." on the ticket meant M. H. Kershow and wife; the ticket produced was the first half of a round-trip ticket to Honolulu, purchased by that person. The signature of the purchaser was identified as that of Max H. Kershow.

Proponent lived with decedent at the Riche until March, 1900, when she went back to her former residence and he remained at the restaurant lodgings; she went east in April and stayed there until the latter part of the summer, when she returned and went again to the Riche, where he was still abiding; there she remained with him until November, when she went to Oregon and upon her return took up with him at Tortoni's, where she sojourned until the following February or March, when she went back to her old home and there stopped until she went to China in May, 1901, where she was when decedent died and where she was advised of his death, leaving a will in which she was a beneficiary and legatee. If proponent is to be believed, she knew nothing of the alleged will until the information came to her in China by cable about the 3d of July, and never saw the paper until she returned here in the latter part of August, 1901, when it was exhibited to her in an attorney's office.

Proponent separated from decedent several times, she said, because he would go on a drinking spell and when she could not correct him she would leave him, but they continued friendly; she scolded him for his lapses, but never chastised him except verbally; never laid hands on him save in the way of kindness; after she quit Tortoni's she still visited him nearly every day until she went to China; had dinner there at times with him; she was there every Saturday night and remained over Sunday; used to go up there after dinner on Saturday night; she saw Morgan Smith there frequently—he dined there at times; she visited decedent frequently at his rooms in April, 1901, and saw different persons in his apartments at various times, among others Morgan Smith, Carlton Kershow, Moses Getz and his two barkeepers, and other friendly visitors; Morgan Smith was there on the occasion

of the injury to his eye for about a week. In the opinion of proponent decedent was of sound mind, her judgment being based on his acts and conversation; he drank a good deal; about half the time intoxicated; sometimes sober two or three days at a time; he would sometimes drink Apollinaris in his whisky, but considering that too expensive he substituted plain water for dilution; he never drank absinthe while she was with him.

It was this woman whom decedent made his residuary legatee, describing her as his sincere and devoted friend, if Morgan Smith is to be credited. When Smith on the evening of the 5th of April, 1901, was requested by Kershow to draw the will, the latter said, "I am, as you know, in love with Miss Gettings. I do not see that I should leave anything to my family; they have not done the right thing by me; they have tried to prevent me doing several things I wanted to do, and, therefore, I want this to be a matter of the greatest secrecy"; this was the gist of what decedent said that evening, according to Smith. Meadows testified that at the time of the execution of the will the deceased read it aloud, he remarked that his brother's name was misspelled and Smith asked if he should write it over and he said "No," that they had wasted enough time on the matter. He said that he wanted to provide for his dear friend "Babe," which appears to have been a pet name for proponent. Meadows asked decedent if he was a lawyer; he smiled and said he had studied law; the witness made the inquiry because of the terms used in the will; after decedent signed he said he would dictate the attestation clause and Smith then took down from dictation what is in that clause; then Smith and Meadows subscribed as witnesses; Smith added the date in presence of Meadows: "April the sixth, nineteen hundred and one." Meadows said he stated the facts as they occurred at the time of the transaction of signing the will; everything took place just as he testified. If, then, Meadows testified truthfully, Max H. Kershow signed the paper propounded, knowing its contents, in the presence of the two subscribing witnesses to whom he declared it to be his last will and testament, requesting them to be the witnesses of his act, and they signed each in his presence and in the presence of each other, and

he was sane and sober when all this was done; but contestant says that Dr. Wagner, John Roland, and Alice Kennedy, all unimpeached, prove that those two persons, Smith and Meadows, were not there at Tortoni's or thereabouts at the time indicated, and that this paper exhales the effluvia and exhibits all the earmarks and indicia of fraud and fabrication. So far as Dr. Wagner's testimony is concerned, the witnesses Smith and Meadows may have been there without his knowledge, as at the particular times to which they testify his attendance was not necessary and his absence is probable; but not so with Alice and John, as they swear they were there all the time and could not have been mistaken as to the facts.

The burden is upon contestant.

It may be that there is a suspicious similarity and agreement between the testimonies of Smith and Meadows, all the more remarkable because neither was present at the trial when the other was on the stand, suggesting a concert of purpose to concoct a spurious document and swear it through the courts; it may be that the very means have been here employed in this instrument which have become the "properties" and adjuncts of a dramatic play intended to impose upon judge and jury the false emanation of a criminal brain; it may be that the coupling as coexecutor with proponent of the name of a member of the bar of high repute, with whom decedent had but a casual acquaintance, bearing an inherited appellation of honor and distinction, was done with a design to give credit and currency to a counterfeit; it may be that the bequests to relatives were in the bill of properties drawn by the stage director for the successful presentation of this drama of contemporaneous human interest—but the question is, Are these surmises and suspicions proved directly or circumstantially? Are they susceptible of proof?

If Smith and Meadows tell the truth, then decedent was a sober man at the time of the execution, though suffering from the effects of a debauch which ended on the 1st of April; but he was not in liquor on the 5th or 6th of April, when he dictated and executed the will. If their story be fact and not fiction throughout, he was at that time competent to make a will, because it is evident from its terms that he possessed that degree of testamentary capacity at the moment of making

the will which entitles his act to consideration. Dr. Wagner's opinion of what decedent's condition was when he saw him is inconsistent with the theory that Kershow was enjoying a lucid interval when Smith and Meadows were with him. It has been held that if a testator, though insane, made a natural and consistent distribution of his property, a lucid interval at the moment of making the will might be justly presumed. In the English case of *Cartwright v. Cartwright*, the judge deciding said that the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself, and if it can be established that it is a rational act rationally done, the whole case is proved.

It is hardly to be contended that decedent was a lunatic; the most that is claimed is that his habits had so debilitated his mind as to destroy his testamentary capacity; but if by the suspension of those habits for a period he so far regained possession of his faculties as to admit of the presumption that his testament was made during the time of his calm and clear intermission, such testament should be held good; and, as an ancient author affirms, although it might not be proved that the testator had any clear and quiet intermissions at all, yet nevertheless if the testament be wisely and orderly framed, the same ought to be accepted for a lawful instrument. Thus it might happen, in accordance with this principle, that a man who was acknowledged to be incapable of managing his own affairs would be deemed competent to dispose of his property by will, if the document seemed a rational act rationally done.

Alice and John testified that decedent sometimes had visions. Dr. Wagner thought he was subject to hallucinations, but there is no evidence that he had any delusion that operated on the testamentary act. Unless the will be the very creature of a morbid delusion put into act and energy, it is a valid will. The mere fact of the possession of a delusion, as was said in the charge to the jury in the case of *Boardman v. Woodman*, in New Hampshire, may not be sufficient to render a person utterly incapable of making a valid will; a person of sufficient mental capacity, though under a delusion may make such a will; if the testament be in no way the offspring of such delusion, it is unaffected by it. It can scarcely be pretended

that Max Kershow was laboring under any delusion at the time of the execution of this instrument. Whatever fault may be found with his preference of proponent for residuary legatee, he gave reasons which seemed to him sufficient, and the court has neither right nor power to quarrel with the moral quality of his acts; the court may not say that he should have made a different disposition; it cannot make a will for him.

According to Kershow's conception of his obligations this will was natural and consistent; he remembered his relatives and gave their names, although through the error of the scribe his brother's name was misspelled; he gave something to his female servant and to his friend Smith, and the rest to the proponent. To these persons he was bound, in the language of the law, by ties of blood, affinity or friendship; he had an idea of the character and extent of his property, and he was capable of considering the persons to whom and the manner and proportions in which he wished his property to go; these are the constituents of testamentary capacity.

The evidence of Smith and Meadows is not overborne by that of the witnesses for contestant; the attempt to impeach the reputation of the latter was countered by testimony in his favor, but the weight to be given to either or both is not affected by that sort of evidence, one way or another, in view of the facts and circumstances corroborative of their statements already recited at length. Treating this case as if the onus lay where the law does not place it, it is made out in favor of proponent; at all events, the contestant has not proved by a preponderance of evidence the issues tendered by his opposition to the probate of this instrument, and judgment must be and is entered against him.

While a Foreign Will may be subject to contest when application is made to have it proved and recorded in a jurisdiction where the testator left property, still it should be observed that a judgment in a probate proceeding is a judgment in rem—that is, it determines the status of the matter. Therefore, the judgment of a court admitting a will to probate fixes the status of the instrument as a will, and becomes at once conclusive upon the world of all the facts necessary to the establishment of a will, among which are, that at the time the will was executed the testator was of sound and disposing mind, and was not acting under duress, fraud or undue influence. It fol-

lows, for example, that a will executed in California by a testator there residing, and subsequently admitted to probate in that state, may not, when afterward admitted to ancillary probate in Montana, where the testator left real and personal property, be contested on the ground that the testator was not of sound mind, or acted under duress, fraud or undue influence, the Montana statutes providing that when such foreign will is admitted to probate in this state it shall "have the same force and effect as a will first admitted to probate in this state": 1 Ross on Probate Law and Practice, 291.

When the Will of a Nonresident is Admitted to Probate on original proceedings for the purpose of administering on his property within the state, the decree therein binds that property here and everywhere that our courts are accorded full faith and credit, but it is not binding as to the will itself in other jurisdictions where the deceased may have left property, nor is it binding on the courts of his domicile: Estate of Clark, 148 Cal. 108, 113 Am. St. Rep. 197, 82 Pac. 760, 1 L. R. A., N. S., 996.

A Person is of Sound and Disposing Mind who is in the possession of all the natural mental faculties of man, free from delusion, and capable of reasonably thinking, acting and determining for himself: Estate of Ingram, 1 Caf. Pro. Dec. 222; Estate of Scott, 1 Caf. Pro. Dec. 271.

ESTATE OF HIRAM A. PEARSONS, DECEASED.

[No. 8694; decided October 29, 1891.]

Wills—Intention of Testator—How Determined.—In construing a will the aim of the court is to arrive at the intention of the testator by an examination of the will, and the circumstances surrounding its execution, and the age and experience of the testator.

Wills.—The Provisions of the Will in this case show that the testator divided his property into two classes: First, the property held jointly with his aunts; and, second, all other property.

Wills—Technical Words—When Given Popular Meaning.—When a testator is not versed in the meaning of technical terms, it should be presumed that he used his words according to their ordinary meaning and in their popular sense. The words of a will should not be subjected to such a strain as to force them out of the natural channel of construction into the narrow legal groove in which the testator's mind was clearly not accustomed to travel.

Wills—Technical Words—When Given Their Popular Meaning.—It is the duty of the court to look for general intent of the testator, to put itself in his place, to regard coexistent circumstances, and, if a technical construction of words and phrases is at variance with the

obvious general intention, to apply a rule of interpretation which will give to language its ordinary effect.

Wills—Construction.—While It is True that a Will Takes Effect Only from the Date of the death, it may be construed according to the circumstances and the facts existing in the mind of the testator at the date of execution. Whenever a testator refers to an actual existing state of things, or to what he considers to be such a state, his language is referential to the date of the will and not to what may exist at the time of his death, which is a prospective event.

J. H. Moore, for executor.

Wilson & Wilson and Lloyd & Wood, for Mrs. Kinsey.

Thomas F. Barry, for absent heirs.

I. N. Thorne, J. B. Mhoon, Messrs. Kelly, Marble & Phipps, and Hermann & Soto, for certain heirs.

A. N. Drown, J. E. Foulds, M. C. Hassett, Joseph Naphtaly, A. H. Loughborough, and George W. Haight, for various orphan asylums.

COFFEY, J. This is an application on the part of the executor of the will of Hiram A. Pearsons, deceased, for a construction of that instrument, presenting for solution by the court certain questions which may be stated briefly as follows:

1. What, if any, real property described in the will was held jointly by testator with Betsey F. Mathewson and Polly Barton?
2. Which are to be designated as the orphan asylums of San Francisco, according to will?
3. Who are the legatees and devisees of specific bequests and devises, and to what are they entitled as distributees?
4. What real estate shall be sold to pay bequests?
5. Who are the next of kin and heirs at law?
6. What portions, if any, of testator's estate were and are by the provisions of will devised or bequeathed, and what portions were not so devised or bequeathed?

Hiram Arthur Pearsons died at Chicago, Illinois, July 7, 1889, leaving an olographic will, made in April, 1882, and being at the time of his death twenty-eight years of age.

Upon the hearing of the petition for the construction of this will, it was established that his father, Hiram Pearsons, deceased, owned in the block bounded by Clay, East, Merchant and Drumm streets, a frontage of one hundred and seventy-eight feet on Clay, running back to Merchant, and bounded on the east by East street, and had deeded to H. A. Pearsons the westerly sixty-eight feet (about) thereof, and had devised the remaining one hundred and ten feet to said H. A. Pearsons, his son, and his widow, in equal undivided shares; that said Hiram Pearsons died testate in 1870, leaving him surviving his said widow, Ann Charity (sometimes called Charity Ann) Pearsons, and his son, said H. A. Pearsons; that said Ann Charity Pearsons died testate in 1875, and that in her will, duly admitted to probate, it was provided that her two sisters, Polly Barton and Betsey Frances Mathewson, should receive the income from her said undivided one-half of said one hundred and ten feet during the term of their natural lives, or of the survivor of them, with remainder over to H. A. Pearsons; that up to the time of the death of said sisters the income of said property was divided equally between said H. A. Pearsons and said sisters, and the survivor of them; that June 30, 1889, the survivor of said sisters died. It was also shown upon said hearing that there are orphan asylums of various religious denominations, some in San Francisco and others in Marin and San Mateo counties, some being in existence at the time the will was executed, and some established since said date, but prior to the death of said Pearsons, and there being more than one orphan asylum controlled by certain religious denominations, although organized independently.

It was also shown that among the claimants, as heirs, are two half-sisters of Hiram Pearsons, father of Hiram Arthur Pearsons, and five brothers and sisters of Ann Charity Pearsons, mother of deceased, and also that there are certain children of deceased, uncles and aunts of Hiram Arthur Pearsons.

The will in question is in the words and figures following, to wit:

"IN THE NAME OF GOD, AMEN: I, Hiram A. Pearsons, of the City and County of San Francisco, and State of Califor-

nia, being of sound mind and memory, and considering the uncertainty of life, do therefore make, ordain, publish and declare this to be my last will and testament. That is to say—

“First: I give, devise and bequeath unto Betsey Frances Mathewson and Polly Barton, my aunts, the following described lots and pieces of land situated in the City and County of San Francisco, State of California, and laid down and described on the official map of the said city as follows, to wit: Commencing at a point on the south line of Washington street, which is one hundred and thirty-seven (137) feet six (6) inches east from the intersection of the east line of Drumm street where it intersects the south line of Washington street; thence running easterly on the southerly line of Washington street two hundred and ninety (290) feet to the eastern water front of said city; thence southeasterly along said east water front one hundred and forty-two (142) feet to the north line of Merchant street; thence in a western direction on what is known as the northern line of Merchant street, which line is distant one hundred and fifteen (115) feet from the southern line of Washington street, and running parallel therewith, to a point which is on said northern line of Merchant street and distant one hundred and thirty-seven (137) feet six (6) inches east of the eastern line of Drumm street; thence north at right angles to Washington street one hundred and fifteen feet to the point of commencement.

“Second: I do give, devise and bequeath unto Betsey Frances Mathewson and Polly Barton, my aunts, all real property which I hold jointly with them. And I direct that in the event of the death of either Betsey Frances Mathewson or Polly Barton prior to that of my own, all property of whatever nature herein bequeathed to them shall revert and vest in the survivor, her heirs and assigns forever. And furthermore: In the event of the death of both Betsey Frances Mathewson and Polly Barton prior to my decease, the aforesaid property, otherwise bequeathed to them, shall be sold at public auction to the highest cash bidder, the proceeds of said sale to be equally distributed among the differ-

ent orphan asylums of the City and County of San Francisco. And said asylums I request to be designated by the Judge of the Probate Court.

"Third: I do give, devise and bequeath unto Isabella Rogers Kinsey, wife of my former guardian, her heirs and assigns forever, all that property which is owned by me in the block bounded on the south by Clay street, on the west by Drumm street, on the north by Merchant street, and on the east by East street; excepting therefrom that portion which I hold jointly with Betsey Frances Mathewson and Polly Barton, and which has hereinbefore been bequeathed to them.

"Fourth: I do give, devise and bequeath unto A. G. Kinsey, my former guardian, his heirs and assigns forever, all my right, title and interest in blocks numbered 35, 36 and 37, at North Beach.

"Fifth: I do give, devise and bequeath unto Laura M. Witty, of Modesto, Stanislaus Co., Cal., daughter of Mrs. J. E. Hyslop, of the same place, all my stock in the Spring Valley Water Company, of the City and County of San Francisco, and I direct that in the event of my not being possessed of any of said stock at the time of my death then ten thousand (\$10,000) dollars is to be paid to the said Laura M. Witty; or if there should not be enough of said stock at its market value at the time of my death to amount to ten thousand (\$10,000) dollars, then the deficiency is to be paid to the said Laura M. Witty in cash, together with whatever stock there may be. But if the said Laura M. Witty should not survive me then this bequest (the 'Fifth') is to be distributed to orphan asylums as hereinbefore requested.

"Sixth: I do give, devise and bequeath unto Laura M. Witty five thousand dollars, to be held in trust and invested in some safe security by her mother, Mrs. J. E. Hyslop, who shall receive one-half of the interest thereon, if any there be, until the expiration of five years after my decease, when the remaining one-half of the interest, together with the principal, shall be given to the said Laura M. Witty. Or, in the event of the death of Mrs. J. E. Hyslop prior to that of the

said Laura M. Witty, the two preceding bequests ('Fifth' and 'Sixth') are to be paid from the moneys standing to my credit; and, if not sufficient, then from a fund created by the sale of notes, securities or other property.

"Seventh: I do give, devise and bequeath the remainder of my property of whatever kind to Betsey Frances Mathewson and Polly Barton, subject to the reversion before stated. All the above real property being situated in the City and County of San Francisco, State of California.

"Eighth: I do give, devise and bequeath unto T. C. Hill, of Western Springs, Illinois, all my right, interest and title of whatever kind to all real property in Cook County, Illinois. (To be used for charitable purposes.) Should any devisee or devisees of this will attempt to annul or set aside any bequest herein made, then the person so doing shall forfeit his or her bequest to the person whose bequest is so attacked. This I declare to be an olographic will. Betsey Frances Mathewson is the maiden name of Mrs. Julius T. Newell. And I do hereby nominate and appoint Elliot J. Moore the executor of this my last will and testament, and I do release him from the necessity of giving any bond or bonds as such executor.

"H. A. PEARSONS. (Seal.)

"San Francisco, August 9, 1882.

"San Francisco, April 13, 1885.

"The Fifth bequest, commencing on the second line of fourth page, and also the following, the Sixth, I now declare to be annulled. And I further direct that the benefits of these bequests (the Fifth and Sixth) shall be given to my aunts according to the provision of the seventh clause.

"H. A. PEARSONS. (Seal.)"

While the whole of the will is hereinabove set forth, there are only two clauses which it is necessary to construe in this proceeding, although it may be remarked that it is established by evidence that the testator left legal heirs him surviving; but this is not a proceeding to establish heirship, and the evidence in that behalf may be disregarded for the present purpose, nor need there now be any determination by this court as to the particular orphan asylums included within

the terms of the bounty of the testator, as any opinion upon these points would be premature and not binding when the matter shall come before the court in proper form for final decision.

The clauses of the will which it is necessary now to construe are as follows:

"Second: I do give, devise and bequeath unto Betsey Frances Mathewson and Polly Barton, my aunts, all real property which I hold jointly with them; and I direct that in the event of the death of either Betsey Frances Mathewson or Polly Barton prior to that of my own, all property of whatever nature herein bequeathed to them shall revert and vest in the survivor, her heirs and assigns forever; and, furthermore, in the event of the death of both Betsey Frances Mathewson and Polly Barton prior to my own decease, the aforesaid property otherwise bequeathed to them shall be sold at public auction to the highest cash bidder, the proceeds of said sale to be equally distributed among the different orphan asylums of the City and County of San Francisco; and said asylums I request to be designated by the Judge of the Probate Court.

"Third: I do give, devise and bequeath unto Isabella Rogers Kinsey, wife of my former guardian, her heirs and assigns forever, all that property which is owned by me in the block bounded on the south by Clay street, on the west by Drumm street, on the north by Merchant street, and on the east by East street, *excepting therefrom* that portion thereof *which I hold jointly* with Betsey Frances Mathewson and Polly Barton, and which has hereinbefore been bequeathed to them."

"Seventh: I do give, devise and bequeath the remainder of my property, of whatever kind, to Betsey Frances Mathewson and Polly Barton, subject to the reversions before stated."

First—As to the construction of the devise to Isabella Rogers Kinsey:

The three clauses above set forth, when read together—and they are the only clauses bearing upon this subject—show that the testator divided his property into two classes: First, the property held jointly with said Betsey Frances

Mathewson and Polly Barton; and, second, all other property. The aim of this court is to arrive at the intent of the testator, by an examination of the will and the circumstances surrounding its execution, and the age and experience of the testator; and no authorities need be cited to sustain this proposition.

As one of the devisees named in said will, and under the facts admitted and claimed to have been proved at the time of the hearing of the petition of the executor for the construction of the will of said deceased, Mrs. Isabella Rogers Kinsey claims the following described lot of land in the city and county of San Francisco:

Commencing at a point on the northerly line of Clay street distant two hundred and forty-seven feet and three inches easterly from the corner formed by the intersection of said northerly line of Clay street with the easterly line of Drumm street, and running thence easterly along said northerly line of Clay street one hundred and seventy-eight feet and nine inches; thence at a right angle northerly and parallel with said easterly line of Drumm street one hundred and fifteen feet to the southerly line of Merchant street; thence running westerly and along said southerly line of Merchant street one hundred and seventy-eight feet and nine inches; thence at a right angle southerly and parallel with said westerly line of Drumm street one hundred and fifteen feet to said northerly line of Clay street and the point of commencement.

In whom was the fee to this tract or parcel of land vested on July 7, 1889, the date of the death of Hiram Arthur Pearsons?

Upon this question, among others, the executor seeks the instruction and advice of the court.

If it shall be determined to have been in Hiram Arthur Pearsons at the time of his death, it is contended by her counsel that upon his death the title to all of it vested *eo instanti* in Isabella Rogers Kinsey, subject only to the usual probate administration upon his estate in this court.

To arrive at a conclusion as to whom the fee to this parcel of land was vested in on July 7, 1889, the date of the death

of Hiram Arthur Pearsons, it will be necessary to look carefully into the history of its title as disclosed by the record before the court.

On November 25, 1851, Hiram Pearsons, the father of Hiram Arthur Pearsons, was the owner in fee simple of the whole of said tract of land.

In 1854 the said Hiram Pearsons intermarried with Ann Charity Mathewson, and thereafter, in 1860, there was born to them a son, Hiram Arthur Pearsons, whose estate is now being administered in this court, and in which estate this proceeding is had.

The entire property above described was, therefore, the separate property of Hiram Pearsons, having been acquired by him three years prior to his marriage to Ann Charity Mathewson.

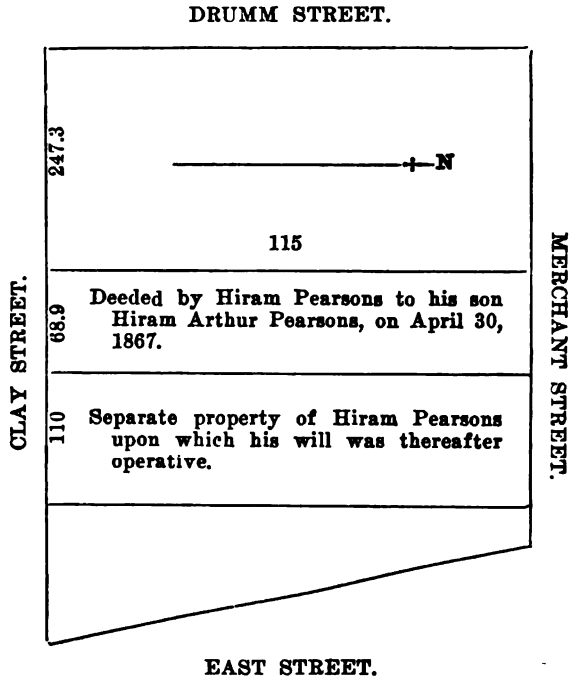
On April 12, 1866, Hiram Pearsons made his last will and testament, wherein he gave and bequeathed all the rest, residue and remainder of his estate, including all the tract of land above described, to his wife, Ann Charity Pearsons, and his son, Hiram Arthur Pearsons, share and share alike.

On April 30, 1867, one year and eighteen days after making this will, Hiram Pearsons made, executed, delivered and caused to be recorded a deed in writing under his hand and seal, in due form of law, conveying to his said son, Hiram Arthur Pearsons, a portion of the tract of land above described, and which portion so conveyed to his son was, and is, particularly described as follows, to wit:

Commencing at a point on the northerly line of Clay street distant two hundred and forty-seven feet and three inches easterly from the corner formed by the intersection of the northerly line of Clay street with the easterly line of Drumm street, and running thence easterly along the northerly line of Clay street sixty-eight feet and nine inches; thence at a right angle northerly and parallel with said easterly line of Drumm street one hundred and fifteen feet to the southerly line of Merchant street; thence running westerly along said southerly line of Merchant street sixty-eight feet and nine inches; and thence at a right angle southerly and parallel with said easterly line of Drumm street one

hundred and fifteen feet to said northerly line of Clay street and point of commencement.

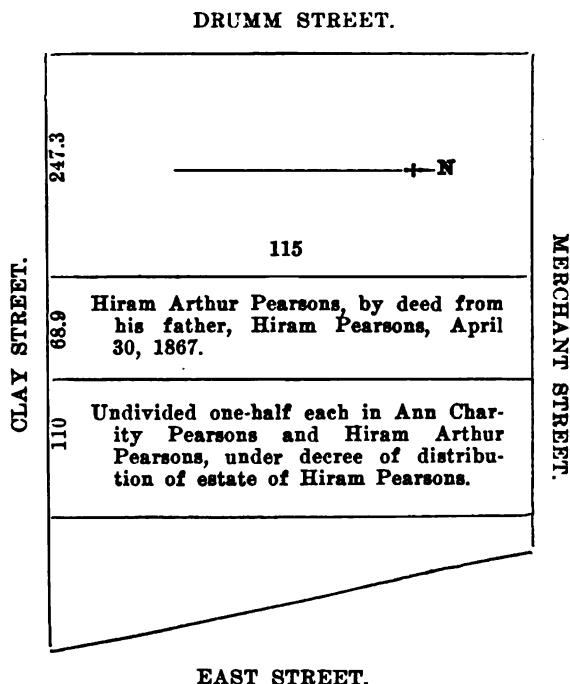
By virtue of this deed of conveyance from Hiram Pearsons to Hiram Arthur Pearsons the tract of land was segregated, and as to the legal title it thereafter stood as per this diagram:



On August 11, 1868, one year, three months and eleven days after making this deed to his son, Hiram Arthur Pearsons, Hiram Pearsons, the father, died, leaving the above-mentioned will, dated April 12, 1866, as his last will and testament, and leaving surviving him, as his only heirs at law, his widow, Ann Charity Pearsons, and his said son, Hiram Arthur Pearsons, his and their only issue.

By decree of final distribution of the estate of Hiram Pearsons, all the rest, residue and remainder of his estate was distributed, in the language of the decree of distribution, to Ann Charity Pearsons and Hiram Arthur Pearsons, "share and share alike, each of them being entitled to one equal

undivided one-half part thereof," and thereupon the tract of land originally hereinabove described as being 178.9x115, stood as to title as per this diagram:



Notwithstanding the fact that Hiram Pearsons owned only at the time of his death the lot fronting one hundred and ten feet on Clay street, with a uniform depth of one hundred and fifteen feet back to Merchant street, yet through error the whole lot, 178.9x115, was included in the inventory of his estate, and this error was perpetuated throughout the entire administration of his estate down to and including the decree of distribution of his estate.

In the decree of distribution of the estate of Hiram Pearsons, dated May 8, 1871, we find the following:

"Third: All the rest and residue of said estate of said decedent, both real and personal, remaining in the hands of said executrix and executors and particularly described as follows, viz.:

"All that certain lot, piece or parcel of land situated in said City and County of San Francisco, commencing on the northerly line of Clay street at a point distant two hundred and forty-seven and a quarter ($247\frac{1}{4}$) feet easterly from Drumm street, running thence easterly along said line of Clay street to East street, thence northerly along East street to Merchant street, thence westerly along Merchant street to a point opposite the place of beginning, thence southerly parallel with Drumm street to the place of beginning, excepting, however, the half of a fifty-vara lot, conveyed by said Hiram Pearsons in his lifetime to the Clay Street Wharf Company, by deed dated February 6, 1855, and recorded in the Recorder's office of said city and county, in Liber 50 of Deeds, page 413.

"Also: [Then follows a description of a large quantity of other real and personal property, and the decree then continues and concludes as follows:]

"Is hereby assigned, set over, transferred and distributed to said Ann C. Pearsons, the widow, and said Hiram Arthur Pearsons, the minor son, of said Hiram Pearsons, deceased, share and share alike—that is to say, the one equal undivided half part thereof to said Ann C. Pearsons, and the other equal undivided half part thereof to said Hiram Arthur Pearsons.

"And it is further ordered: That said executrix and executors, upon payment and delivery of said residue as hereinbefore ordered and decreed, and upon filing due and proper vouchers and receipts therefor in this Court, be all and each of them fully and finally discharged from their trust as such executrix and executors."

It is claimed that this decree was operative only as to the lot of land fronting one hundred and ten feet on Clay street, with a uniform depth of one hundred and fifteen feet back to Merchant street, and that the decree could in no way affect the legal title to the lot 68.9x115, deed by Hiram Pearsons in his lifetime, on April 30, 1867, to his son, Hiram Arthur Pearsons. At the time of this distribution of Hiram Pearsons' estate, his son, Hiram Arthur Pearsons, was but eleven years old.

Notwithstanding the terms of the decree of distribution of Hiram Pearsons' estate, it is claimed that the minor son, Hiram Arthur Pearsons, continued to be the sole owner of the lot fronting on Clay street, 68.9x115, previously deeded to him by his father on April 30, 1867, and by virtue of the decree of distribution in his father's estate he further became the owner, in the language of the decree, of "an equal, undivided one-half part" of the lot fronting on Clay street, 110x115, immediately adjoining on the east his separate property 68.9x115, above referred to.

Of the original lot of land fronting on Clay street, 178.9x115, it seems, therefore, that after the decree of distribution of the estate of Hiram Pearsons, his son, Hiram Arthur Pearsons, was the sole owner of the most westerly 68.9x115, and was also the owner of an equal undivided one-half in common with his mother, Ann Charity Pearsons, of the adjoining 110x115, and equal in size to a lot 55x115.

The title to the remaining undivided lot, equal in size to 55x115, was then vested in Ann Charity Pearsons.

With this understanding of the then condition of the legal title to the land in question, we pass on to the next chronological event.

On May 16, 1874, Ann Charity Pearsons made her last will and testament, wherein, among other things, she provided as follows:

"I do give, devise and bequeath unto my beloved son, Hiram Arthur Pearsons, all real and personal property *which I own jointly with him*, together with the family portraits and silverware and my small diamond ring."

The testatrix also made the following provision:

"I give, devise and bequeath to my beloved sisters, Polly Barton and Betsey Frances Mathewson, *for their use during the term of their natural lives, and to the survivor of them, share and share alike, all my interest in (describing other property), . . . and also all the income from all the property which I own jointly with my son, Hiram Arthur Pearsons.* And I empower the said Polly Barton and Betsey Frances Mathewson, at their option, to sell and convert into cash any and all of said stocks, notes, securities and property, and to invest the proceeds arising therefrom as they shall

deem best, and to enjoy the income thereof during their lives, and to the survivor of them. And I direct that in the event of the death of either of the said Polly Barton or Betsey Frances Mathewson, the survivor shall have full power to sell said property and invest the proceeds as she shall deem proper, *the income arising therefrom to be for her sole use and benefit, and after the death of such survivor the whole of said property or proceeds thereof shall revert to my son, Hiram Arthur Pearsons.*"

Ann Charity Pearsons died in the same year, after having made this will, leaving surviving as her sole heir at law her said son, Hiram Arthur Pearsons. Her will was in due time admitted to probate, and her estate was finally distributed on December 22, 1875.

The only interest that Ann Charity Pearsons had at the time of her death in the lot of land fronting one hundred and ten feet on the north side of Clay street, and running through with a uniform depth of one hundred and fifteen feet to Merchant street, was an "equal undivided one-half part thereof," and yet the decree of distribution in her estate provided, among other things, as follows:

"And also to Polly Barton and Betsey Frances Mathewson to their use during the term of their natural lives, share and share alike, and to the survivor of them, *all the income from the undivided half* of all the following described property situated in the City and County of San Francisco, and State of California, to wit:

"That lot commencing on the north line of Clay street at a point two hundred and forty-seven feet three inches from the northeast corner of Drumm and Clay streets; running thence easterly along the north line of Clay street 176 96/100 feet; thence at right angles northerly one hundred and fourteen feet to Merchant street 176 96/100 feet; thence at right angles southerly one hundred and fourteen feet to the point of beginning; also . . . and in the event of the death of Hiram Arthur Pearsons before the deaths of Polly Barton and Betsey Frances Mathewson, or either of them. the above mentioned property, and the whole thereof, shall go to the said Polly Barton and Betsey Frances Mathewson, or the survivor of them, absolutely, share and share alike, their or

her heirs or assigns forever. And to Hiram Arthur Pearsons, the silverware, family pictures, and the small diamond ring, and all the property hereinbefore described, *subject only to the rights, interests and uses hereinbefore reserved to Polly Barton and Betsey Frances Mathewson, or to the survivor of them*, and also all the property, real, personal and mixed, hereinbefore described, or the proceeds thereof remaining after the death of Polly Barton and Betsey Frances Mathewson, and the survivor of them, *or to the survivor of them*, and also all the property, real, personal and mixed, hereinbefore described, or the proceeds thereof remaining after the death of Polly Barton and Betsey Frances Mathewson, and the survivor of them, and also any other property not now known or discovered which may belong to said estate, or in which the said estate may have any interest."

It is claimed by counsel for Mrs. Kinsey that Ann Charity Pearsons, at the time of her death in 1874, had no interest in the lot of land 68.9x115, which had been conveyed on April 30, 1867, by Hiram Pearsons to his minor son, Hiram Arthur Pearsons, and as to the adjoining lot of land, 110x115, she only owned an equal undivided one-half with her son, Hiram Arthur Pearsons. At this time, December, 1875, the son was fifteen years of age.

It appears that the executor and his attorney in this present proceeding, at the time of filing the petition for the construction of the will of Hiram Arthur Pearsons, were still laboring under an erroneous impression as to the extent of the interest of Polly Barton and Betsey Frances Mathewson in this property during their lives. The petition, as originally filed, informed the court that they had a life interest in the income of one-half of the entire lot of land fronting on Clay street, 176 96/100x114, but if this were error it was corrected by an amendment to the original petition, and now, for the first time since the death of Hiram Pearsons, on August 11, 1868, more than twenty-two years ago, it is claimed that the probate record of the condition of the title to this lot of land 178.9x115 is correct, and as it always should have been.

During the lifetime of Polly Barton and Betsey Frances Mathewson they had the right only to claim the income from one-half of this lot 110x115, equal to a lot in size 55x115, and,

upon the death of the survivor of these two, Hiram Arthur Pearsons had the right to keep all the income for himself and in his own right.

This is the contention of counsel for Mrs. Kinsey, who claim, also, that the fee to the lot 110x115 was not disturbed or affected in any way by the death of the aunts, because the legal title to the entire piece had always been vested in Hiram Arthur Pearsons from the time of the death of his mother in 1874. The aunts practically had an annuity out of the land during their lives, and nothing more.

Polly Barton died May 25, 1888, and Betsey Frances Mathewson on June 30, 1889, neither of them leaving any surviving spouse, issue or lineal descendants, and on July 7, 1889, just one week after the death of the survivor of these two aunts, Hiram Arthur Pearsons passed away.

It is contended by counsel for Mrs. Kinsey that it was the intention of the testator to confirm to the aunts the income for their lives, and to perpetuate and secure it to them during their natural lives, so that they could rely upon it in the same manner as if he had survived.

It is contended, also, by counsel for Mrs. Kinsey that the testator, Hiram Arthur Pearsons, never did "hold jointly" any real property with Betsey Frances Mathewson and Polly Barton, or with either of them, and it is claimed that to "hold jointly" necessarily means ownership and right of possession, and upon this interpretation, as supported by the evidence as to the facts, depends the claim of Mrs. Kinsey to the whole of the parcel of land described in the third clause or paragraph of the will.

It seems to me that the adoption by the court of this view would not effectuate the intention of the testator. He evidently drew a distinction between "owning" and "holding," and although the second clause of the will may be inoperative, it is properly invoked to aid in the interpretation of the language of the third clause.

While it is true that a will takes effect only from the date of the death, it may be construed according to the circumstances and the facts existing in the mind of the testator at the date of execution. Whenever a testator refers to an actually existing state of things, or to what he considers to

be such a state, his language is referential to the date of the will, and not to what may exist at the time of his death, which is a prospective event.

In the construction of the description of the property devised to Mrs. Kinsey, "the court must assume, as nearly as possible, the position of the contracting parties, and consider the circumstances of the transaction between them, and then read the words used in the light of these circumstances."

There must be, in the first instance, a specific thing, specifically described, and a particular person or class clearly indicated. Here we have, as the first, "all that property which is owned by me" in the Clay street block, and that is given to the particular person described as "Isabella Rogers Kinsey, wife of my former guardian."

It is claimed by counsel for Mrs. Kinsey, in construing this specific devise, that this clause of the will speaks from the death of the testator as if it had been written immediately before his death. But I have attempted to show that in this case such a rule cannot apply, and that we should consider the circumstances as they existed at the time of the execution, or as the testator understood them to exist, and so considering this devise to Mrs. Kinsey, independent of the exception, we have, first, that which he held jointly with them devised to his aunts; secondly, that which was owned absolutely devised to Mrs. Kinsey.

In this case, it seems to me, the testator did not design to devise this whole lot to Mrs. Kinsey, as he first gave it to his aunts and then excepted it out of the specific devise to Mrs. Kinsey.

It is not difficult to determine what property was referred to by testator in the second clause of the will.

As to his other property, a portion is located in the block bounded by East, Merchant, Drumm and Clay streets, in San Francisco. He owned sixty-eight and nine-tenths feet frontage off Clay street, absolutely free from interference by anyone, but immediately adjacent to it was another tract of nearly one hundred and ten feet frontage on Clay street, of which he owned an undivided one-half, with remainder over of the other half upon terminations of the life estates of Betsey Frances Mathewson and Polly Barton. This tract he

had already given to his aunts, and, in case of their not surviving him, to charitable institutions.

He desired to give a specific tract to Mrs. Kinsey, and he selected the sixty-eight and nine-tenths feet above described. In clause 3 he gives all the property which is owned by him in said block to Isabella Rogers Kinsey, except the portion held jointly with his aunts and before bequeathed to them.

What is his intent, and does he express it? He does not specifically, by metes and bounds, locate the tract devised to Mrs. Kinsey, but he definitely cuts it out by segregating it from the portion held "jointly," as he calls it, with his aunts.

If they had lived, I do not think that Mrs. Kinsey could claim the whole tract as against them, or that she would be entitled to more than sixty-eight and nine-tenths feet. Then, if this be so, where is the intent, in the event of their death before him, that Mrs. Kinsey was to succeed to their devise? He had already provided that in such case the orphan asylums should be the objects of his bounty, and not Mrs. Kinsey.

This is one of the cases where a will speaks from its date, because it is manifest that the testator refers to an actually existing state of things.

In fact, the exceptions are not intended to provide for an extension of the devise to Mrs. Kinsey, but simply to define and limit the property devised. They do not refer to anything except the property, and therefore, as such words of description and definition, they must have the same meaning, whether these two aunts of testator lived or died. They were designed to make clear a devise of sixty-eight and nine-tenths feet, and did so at the time the will was made, and merely descriptive of it. While testator has not used the best method of expressing his intent, he has done so clearly, and no technical construction should be resorted to to defeat it.

In clause 7 he disposes of his whole residuum to his aunts, subject only to the reservations included in clause 2. So that, as far as the Kinsey devise is concerned, it seems clear that it was his intent to specifically cut out from all his property the portion owned in severalty by him, and in fee, in the block bounded by Drumm, Merchant, East and Clay, at the time of making the will, and devise it to the wife of his guardian; and, further, that in no circumstances was this devise to be

extended, and thus devised sixty-eight feet only to Mrs. Kinsey.

While it is doubtless true, as is so strongly set forth by counsel for Mrs. Kinsey, that this testator had before him, when drawing his own will, the models left by his father and mother, and closely patterned after them, it is also true that he was a layman and not a lawyer, a very young man, and, albeit a man of intelligence and considerable cultivation, he was not versed in the meaning of technical terms, and it should be presumed used words according to their ordinary meaning and in their popular sense. It seems to me that the words of this will, upon which such an elaborate argument is based, should not be subjected to such a strain as to force them out of the natural channel of construction into the narrow legal groove in which the testator's mind was clearly not accustomed to travel. It is the duty of the court to look for his general intent, to put itself in his place, to regard co-existent circumstances, and, if a technical construction of words and phrases is at variance with the obvious general intention, to apply a rule of interpretation which will give to language its ordinary effect.

It follows from the foregoing, if the views of the court be correct, that it should be judicially determined and declared, and it is so determined and declared, in answer to the prayer of the petitioner executor, that the testator, at the time he drew the will before this court for construction, owned the sixty-eight and nine-tenths foot lot in severalty, and he held the one hundred and ten foot lot jointly with his aunts, in the same manner that he had formerly held it with his mother; that by his will testator devised this last mentioned lot to his aunts in case they survived him, otherwise to the orphan asylums; that by the will this lot was expressly excepted from the devise to Mrs. Isabella Rogers Kinsey; that the devise to Mrs. Kinsey is a specific devise intending to operate only on the sixty-eight and nine-tenths foot lot, and that testator intended to and did except from the devise the one hundred and ten foot lot which he had already devised to his aunts.

The Principal Case was before the supreme court of California in 113 Cal. 577, 45 Pac. 849; 119 Cal. 27, 50 Pac. 929.

ESTATE OF FRANCISCA ACKERMAN, DECEASED.

[No. 4630; decided December 27, 1888.]

Homestead—Right of Surviving Husband.—Where a wife declares a homestead upon the community property, and after her death the surviving husband sells such property, he has no right to have a probate homestead set apart to him from her separate estate.

Francisca Ackerman died on September 17, 1885, and on December 9, 1885, Charles Ackerman, her surviving husband, was appointed administrator of her estate, which consisted entirely of her separate property. On July 21, 1888, he filed a petition for a homestead out of the estate. The wife had declared a homestead upon a portion of the community property, and this homestead existed at the time of her death, but was thereafter, and before the filing of this petition, sold by the surviving husband.

Nagle & Nagle, for surviving husband.

W. H. Payson, for certain heirs.

COFFEY, J. This controversy seems to turn upon the question whether applicant, the surviving husband of the decedent, is entitled to a "probate" homestead out of the separate estate of his deceased spouse—a statutory homestead having been selected out of the community property, during her lifetime, which survived to the husband. There may be other points, but, in view of the determination of the court, it is not necessary to consider them. The point of doubt and difficulty which has justified unusual investigation and deliberation is the one noted hereinabove; and it has been very ably presented and contested in the arguments, oral and written, of the respective counsel. The question is for the first time presented to the court in this form. It is, therefore, novel, as it is important; and it should be, as it has been, carefully examined. If resolved in favor of the opponents, it is conclusive and the other objections are not material. The view so very fully and forcibly presented by the counsel for opponents is correct, in my opinion, to this extent at least: It is enough that here a homestead was selected out of

the common property during the marriage and existed at the time of the death of the decedent, and that in such a case as this the surviving husband or wife can only have that homestead, so selected and declared of record, set apart to him or her. The practice of the court accords with this view of the law. It is immaterial, so far as this court in probate is concerned, that the title to the common property, which is claimed to comprehend the homestead, was succeeded to absolutely by the surviving husband. This court in probate does not deal with the question of title to property; it has been held that in the very case of setting apart a probate homestead (so called) the court cannot adjudge in whom the title vests. But aside from the question of title, certain principles have been often reiterated and acted upon with respect to homesteads to be set apart by this court, and the rights of claimants thereto, which may be summed up in one statement: The source and measure of this court's jurisdiction is section 1465, Code of Civil Procedure, which provides that, where a homestead has been selected out of community property, such homestead so selected must be set apart to the surviving husband or wife. It does not affect the question that, as in this case, the husband subsequent to the decease of his spouse sold the community property; the decisive fact is that the homestead existed in the community property at the time of the wife's death.

Application denied.

The Principal Case was Affirmed by the Supreme Court in 80 Cal. 208, 13 Am. St. Rep. 116, 22 Pac. 141, where it is held that upon the death of either spouse, a homestead declared upon community property vests absolutely in the survivor, still retaining its homestead characteristics; and if the survivor afterward sells the same, he is not entitled to have another homestead set apart to him out of the separate estate of the deceased.

ESTATE OF MARY HEROLD, DECEASED.

[No. 11,096; decided August 14, 1891.]

Administration—Right of Minor to Letters of Administration.—Minors are entitled to letters of administration on an equality with persons of full age, except that the letters cannot issue to them directly but to their guardians for them.

Administration—Right of Minor to Letters.—The right of minor children (their father being dead) to letters of administration on the estate of their mother comes into being at the moment of her death, and not at the time their guardian is appointed.

Administration—Right of Minor to Letters as Against Public Administrator.—Where minors are the sole heirs to their mother's estate, they are entitled to letters of administration thereon as against the public administrator.

Administration—Priority as Between Petitions Filed at Different Times.—The fact that the public administrator files the first petition for letters of administration does not give him a better right than the guardians of the minor children of the deceased, whose petition is filed a few days later. The statute nowhere provides for or recognizes any superior right for any such reason.

Administration—What Law Governs.—Where Applicants Claim Under Different Classes, the law at the time of the hearing governs; a person may be entitled to letters at the time of filing his petition under the first class, and yet, at the time of hearing, the statute may be so changed that he will be in the second class, and a person who was in the fifth class might, by such change, then be in the first class.

Mary Herold died intestate on June 20, 1891, leaving a number of minor children who were her sole heirs. Her husband had died before her. On June 23, 1891, John D. Feldmann and Conrad Viereckt filed their petition for letters of guardianship of the persons and estates of the minor children. They were appointed such guardians, and letters of guardianship issued to them on July 1, 1891, and on July 3, 1891, they filed a petition for letters of administration on the estate of the deceased mother. On June 29, 1891, A. C. Freese, the public administrator, filed a petition for letters of administration on the estate of the decedent.

The petitions of the guardians and of the public administrator were heard together on August 3, 1891.

George W. Hupers, for the guardians.

J. D. Sullivan, for the public administrator.

COFFEY, J. The guardians claim the right to letters of administration under the express provisions of sections 1365 and 1368, Code of Civil Procedure.

The public administrator claims the right to letters of administration by reason of having filed his petition therefor before a guardian for the minor children of deceased could be appointed, and bases his claim exclusively upon the decision of this court in the Matter of the Estate of Charles J. Vane, Deceased, No. 10,415.

Decedent left three minor children as her next of kin and heirs at law.

Section 1365, Code of Civil Procedure, provides that "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they *are respectively entitled thereto in the following order:*

"2. The children.

"8. The public administrator."

The law provides (Code Civ. Proc., sec. 1368), that, if the persons entitled to letters of administration are minors, letters must be granted to their guardian, thus securing the rights of minors through their guardian, and placing them in all other respects on the same footing as majors. If the children in this case had been of age the public administrator would undoubtedly concede that they were entitled to letters. As the statute (section 1368) places minors on an equality with persons of full age, except that the letters must not be issued to them directly, but to their guardian for them, I fail to see by what authority they can be deprived of this right. Their right to letters came into being at the moment of their mother's death, and not at the time their guardian was appointed, the latter merely acting in their place and stead, and the same has not been waived or lost by them.

Section 42 of the Civil Code provides that a minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age, except that a guardian must conduct the same; and section 1769, Code of

Civil Procedure, requires the guardian to appear for and represent his ward in all legal proceedings.

Estate of Vane, cited by counsel for public administrator, is not applicable to this case for the reason that the facts are entirely different. In that case both petitioners claimed letters under subdivision 8 of section 1365, while in this case one claims under subdivision 2 and the other under subdivision 8. At the moment that Vane died the public administrator, which office was then filled by Mr. Pennie, became entitled to letters of administration. The hearing of Pennie's petition was set for December 29, 1890, and notice thereof given during his term of office. The petition of Mr. Freese was not filed until January 19, 1891, and the hearing thereon set for January 30th—more than one month after the day set for the hearing of Pennie's petition. In that case there was no question but what Mr. Pennie was at one time entitled to letters, but the contention was that he had lost that right by reason of the expiration of his term of office. The court held that Pennie's right was not lost by reason of the expiration of his term of office.

Mr. Freese does not claim in this case to have succeeded to the rights of the children, but claims in opposition thereto; while in the Vane case he claimed to have succeeded Pennie in his right to letters. Whatever right to letters the children or their guardians and Freese may have in this case arose at the same time, and not, as in the Vane case, those of Pennie at the moment of Vane's death, and those of Freese, if any he had, at the time he assumed the office of public administrator; and upon this latter ground the case was doubtless decided, and not upon the ground that one petition was filed before the other.

The mere fact that in the present case the public administrator filed the first petition does not give him a better right than the guardians of the minor children of the deceased, whose petition was filed a few days later. The statute nowhere provides for or recognizes any superior right for any such reason (see *Estate of McKinnon*, 64 Cal. 227, 30 Pac. 437, where letters were granted on the last petition filed), but, on the contrary, provides that "the court must

hear the two petitions together" (section 1374), and on the hearing "order the issuing of letters of administration *to the party best entitled thereto*" (section 1375).

What occasion would there be for hearing both petitions together and issuing letters to the party best entitled thereto if the first petitioner is entitled to letters from the mere fact of having filed such first petition? Where the applicants claim under different classes, as in this case, the law at the time of hearing is to govern, so that a person may be entitled to letters at the time of filing his petition under the first class, yet at the time of hearing the statute may be so changed that he will be in the second class, and letters accordingly awarded to some other person who might happen to be changed from the fifth to the first class by such change in the statute. This was decided in the Estate of Cotter, Myr. 179, where the nominee of the widow claimed that the right to administer was vested at the date of the application, and could not be affected by any change in the law in that respect.

This is the contention of the public administrator in this case. The court there held that the law at the time of hearing was the rule to be followed.

Suppose in this case that the guardians had filed their petition for letters of administration at the same time that they filed their petition for letters of guardianship (June 23d), as they might have done, as any one has the right to apply for letters, their rights being considered by the court at the hearing, at which time they would show that they had been appointed guardians. According to the claim of counsel they would then be entitled to letters, as the public administrator's petition was not filed until June 29th. The course of procedure adopted by petitioners (guardians), whether applying before or after their appointment, surely cannot give or deprive a person of the right to letters.

If the claim of the public administrator that the right of guardians to letters comes into being at the time of their appointment as such, and that the rights of their wards for whom they apply cannot be considered, be sound and carried out, it will lead to this strange inconsistency in the law.

Subdivision 1 of section 1365 provides for and directs the appointment as administrator of some person whom the surviving husband or wife may request to have appointed; section 1379 authorizes the appointment of a competent person at the request of the person entitled to letters, and section 1368 that letters must be granted to the guardian of the person entitled where such person is a minor; yet in none of these cases could these express and mandatory provisions of the statute be enforced, because the right of such persons would only commence at the date of their nomination or appointment, at which time the public administrator's right to letters will have already "vested" as against such nominee or appointee. That this was not the intention of the law is too clear for argument. The guardians in this case occupy the same position and have the same right as the nominee of a surviving husband or wife or other party entitled, the only difference being that their nominee is selected and appointed by the court instead of by themselves.

That the public administrator should not have priority over the children or their guardian is evident from sections 1365 and 1368, already cited, as also by section 1726, Code of Civil Procedure, which specifies what estates are to be administered by public administrators, namely:

1. Estates for which no administrators are appointed, and which in consequence thereof are being wasted, uncared for, or lost;
2. Estates of decedents having no known heirs;
3. Estates ordered into his hands by the court;
4. Estates upon which letters of administration have been issued to him by the court.

In this case there is a special administrator, and the estate is being cared for, and not being wasted or lost, nor has the estate been ordered into his hands or letters of administration issued to him by the court, and there are known heirs of the decedent.

Should letters be granted to the public administrator in this case, the children will have the right to have the same revoked under section 1383, Code of Civil Procedure, through their guardian (Civ. Code, sec. 42), so that it would be a

useless and unnecessarily expensive proceeding to have an administrator appointed who could immediately be removed.

Feldmann and Viereckt, the guardians of the minor children of deceased, and the sole heirs of her estate, are clearly entitled to letters of administration, and their petition should be granted, and that of the public administrator be denied; and it is so ordered.

Right of Minors to Letters of Administration.—While the codes declare that no person is competent to serve as an administrator who is under the age of majority, they further declare that "if any person entitled to administer is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, within the discretion of the court." The purpose of this section is to place the guardian of a minor, and the adult members of the class to which the minor belongs, upon the same footing as to the right to letters. Hence a court has power to grant letters to the guardian of a minor brother to the exclusion of an adult brother. The statute does not apply to a surviving husband or wife who, though under the age of majority, is old enough to contract a marriage. And it does not authorize a guardian to confer upon another, by written request, a right to administer, for he is not named in the code section enumerating the persons entitled to administer, and his only right to letters is as representative of the minor. The Nevada statute has been construed as not referring to a guardian appointed in some other state: 1 Ross on Probate Law and Practice, 326.

ESTATE OF EMMA CARLSON, DECEASED.

[No. 8800; decided October 8, 1891.]

Executor.—No Executor of an Executor is, as such, entitled to administer on the estate of the first testator.

Executor.—Upon the Death of the Sole Executor of a will, letters of administration with the will annexed of the estate of the testator left unadministered must be granted as designated and provided for in Code of Civil Procedure, section 1365.

Executor.—Where an Executor Died Pending Administration, and his executor waited until seven months after his death before applying for letters of administration with the will annexed on the estate of the first testator, and the public administrator filed a counter-petition four days later, and where it does not appear that the public administrator was ever notified of the death of the executor of the first testator, the contention that the public administrator had waived his right to letters by his laches is untenable.

Julian Pinto and L. Englander, for petitioner Otto Carlson.

J. D. Sullivan, for A. C. Freese, public administrator.

COFFEY, J. The record in this matter shows that Emma Carlson died testate in this city and county on the twentieth day of July, 1889, devising all her estate to John Carlson, her surviving husband, who was in the will nominated and appointed the executor thereof; that on the second day of September, 1889, the will of Emma Carlson, deceased, was admitted to probate by the above-named court, and letters testamentary were duly issued to said John Carlson; that on the sixth day of December, A. D. 1890, said John Carlson died testate at said city and county, and by the provisions of his will his brother Otto, the first petitioner herein, is the devisee of his estate, and that said John Carlson died before completing the administration of said estate of Emma Carlson, deceased; that on the seventh day of July, 1891, and after said estate of Emma Carlson, deceased, had lain dormant for the period of seven months by reason of there having been no administrator appointed to complete the administration thereof, the petitioner, Otto Carlson, applied for letters of administration therein, with the will annexed, on the estate left unadministered; that on the eleventh day of July, 1891, A. C. Freese, the public administrator of said city and county, filed his petition praying for letters of administration with the will annexed of the property left unadministered in said estate of Emma Carlson, deceased, and contests the issuance of letters in said estate to the petitioner, Otto Carlson, upon the ground that said Otto Carlson is not a relative of said Emma Carlson, deceased, and, therefore, he, the said administrator, has the prior right to letters under the order prescribed by section 1365 of the Code of Civil Procedure, relating to persons entitled to administer on the estates of deceased persons.

It is contended on behalf of petitioner, Otto Carlson, that section 1365, above referred to, can have no application as to his right to letters of administration, with the will annexed, issued to him, because that section only applied and

governs the court in the granting of letters on the estates of persons dying intestate.

In this case it is admitted that Emma Carlson, deceased, did not die intestate, but, on the contrary, that she did die testate, and that her will was admitted to probate.

The supreme court of this state, in the Estate of Barton, Deceased, 52 Cal. 540, say: "A decedent whose will is entitled to be admitted to probate did not die intestate, and therefore section 1365 is not applicable to this case, and the probate court, in granting letters of administration with the will annexed, is not limited to the order therein prescribed."

In this case, if the public administrator by any construction of the statute could be deemed to have had a prior right to letters, it is maintained by counsel for Carlson that he waived such right by his laches.

"Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuance of letters to themselves": Code Civ. Proc., sec. 1377.

"If one entitled to administer waives his right to or refuses to apply for letters, the court may appoint another, and thereafter refuse to revoke these letters": Estate of Keane, 56 Cal. 407. See, also, Kirtlan's Estate, 16 Cal. 161.

Counsel for the petitioner, Otto Carlson, insists that he has a right to the benefit of his own diligence and of the public administrator's laches. "*Lex vigilantibus, non dormientibus, subvenit*": 16 How. Pr. 144.

"The law helps the vigilant before those who sleep on their rights": Civ. Code, sec. 3527.

"Between rights otherwise equal, the earliest is preferred": Civ. Code, sec. 3525.

Counsel for public administrator, on the contrary, contends that the Code of Civil Procedure, section 1365, prescribes the order in which letters must be granted, and counsel for said Otto Carlson virtually admits that, if section 1365 applies, the public administrator is entitled to the letters, said Otto not being next of kin to the said Emma Carlson, deceased.

Section 1365, Code of Civil Procedure, does apply to this case: See Code Civ. Proc., secs. 1350, 1353; Estate of Garber, 74 Cal. 338, 16 Pac. 233; Estate of Barton, 52 Cal. 538, was decided November 17, 1876 (by lower court).

Section 1350, above referred to, was amended April 1, 1878, so as to apply to a case of this kind.

The contention as to laches on the part of the public administrator is not tenable, in view of the fact that the petition of Carlson and of the public administrator herein were filed within four days of each other, and there is no claim that the public administrator was ever notified of the death. Otto Carlson's petition must be denied and that of the public administrator granted.

ESTATE OF A. C. WHITCOMB, DECEASED.

[No. 7871; decided May 20, 1890.]

Wills.—Precatory Words are Given only their natural force.

Wills.—Precatory Words.—Where a testator (who is a lawyer) devises property to a nephew and to the nephew's son, and recommends to the nephew to leave his portion thereof, after his own death and the death of his wife, in trust for such son and to his children or descendants, if any are living at the time of the death of the son, and if there are none so living then to Harvard College, the word "recommend" is not equivalent to a direction or command, but is only a suggestion, which the beneficiary is free to follow or ignore.

E. J. Pringle and Jerome B. Lincoln, for A. D. Tuttle.

Sidney V. Smith, for Harvard College.

COFFEY, J. A. C. Whitcomb, senior member of the early day San Francisco law firm of Whitcomb, Pringle & Felton, having acquired a considerable fortune by land speculation and transactions in stocks, withdrew from that firm in 1867. He continued at the bar nominally, but became president of the Citizens' Gas Company, and was generally engrossed with his own private affairs. In 1870 he made a visit to Paris, France, and soon concluded to make that gay capital his permanent home. He was a bachelor of about forty-five years, but now married a French woman, by whom he had

two sons. He died in Paris in 1888, leaving an estate worth \$4,500,000, principally in California lands and eastern railroad bonds, the greater part of which he left by will to his two sons and their mother. Jerome Lincoln, of San Francisco, was named executor of the will to administer that part of the estate lying in California.

Article 6 of the will is in the following words: "I give to my nephew, the said Adolphus Darwin Tuttle, and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, either real, personal or mixed, in the Jimeno Rancho, so-called, wholly or partly in the counties of Colusa and Sutter, in said California, in all mortgages, contracts, debts or due arising therefrom, and I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife, in trust for the said Charles Whitcomb Tuttle and to his children or descendants, if any be alive, at the time of the death of his said son; and, if there be none so alive, to Harvard College, Cambridge, Massachusetts, one-half of the income thereof to be used by said College for the assistance of students of said College to complete their regular course therein, and the other half of the income thereof for the general uses of the College, apart, however, from any participation therein by the Divinity School."

The elder Tuttle—his residence, "said Hancock," being in New Hampshire—came to San Francisco after the probate of the will, and filed a petition requesting the court to construe this article of the will, exactly define his interest under the devise, and make a decree immediately distributing to him in his own absolute right the undivided one-half of the Jimeno Rancho.

Harvard College opposed this petition on the ground that the petitioner was given a life estate only, to be followed by a life interest in his wife, with remainder over to their son for life, with remainder over in fee to the son's issue, or, in default of such issue, to Harvard College.

The question presented was the construction to be put upon the single word "recommend." Was it tantamount to a direction or command, or was it only suggestion which the beneficiary first named was free to follow or ignore?

The matter was very elaborately argued, orally and in printed brief. The judge found and held that A. D. Tuttle was the foster brother of the deceased, who was seeking to pay to him the debt of nurture owing to the devisee's mother; that it was clear from the terms of the devise that, whether the language used was the expression of a trust or not, the testator intended the Tuttles, father and son, to be the chief objects of his bounty, for the enjoyment by them is given in no equivocal terms, and the remainder, by recommendation or trust, in Harvard College, is to vest only at a distant period and upon failure of issue.

To impose upon the beneficiary a trust which, by destroying the power of alienation, sacrifices the enjoyment to perpetuate the title, impoverishing the kindred to enrich the stranger, would be to reverse the testator's bounty. To ascribe this intention to the testator is at the best unnatural; but to suppose that he intended to create in the interest of the stranger a trust whose operation in favor of its beneficiary is to commence, in all probability, not till the lapse of forty years, whilst its intermediate effect is to be an absolute blight upon the dearer beneficiaries, is to convict him of a scheme as foolish as unnatural.

The character of the property excludes the idea that a life enjoyment in it was all that was intended for the Tuttles. While it embraces several thousands of acres and is worth many thousands of dollars, it consists of town lots wholly unimproved and unproductive, of swamp and overflowed lands comprising part of a reclamation district, which lands were assessed last year for \$8,000, are now covered by water and wholly unproductive; and of uplands whose only yield is a minimum return in wheat.

Such is the property which Harvard College would have the kindred of the deceased condemned to preserve intact for, it may be, half a century, and then surrender!

It was shown by the testimony of witnesses that in the mind of the deceased the time had come to realize the value of these lands by making sales in proper parcels. For this express purpose the legal title had been vested in the cotenant, George Hagar. To declare now that A. D. Tuttle holds

the lands in trust would be to defeat the testator's known policy.

Precatory words are to be given only their natural force: Note to *Harrison v. Harrison's Admx.*, 44 Am. Dec. 378, and cases cited: 2 *Pomeroy's Equity*, secs. 1016, 1017.

The *Colton Case* (*Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138), so confidently relied on by Harvard College, does not sustain its position. While the strong pressure of surrounding circumstances would seem to have been controlling in that case, the United States supreme court yet found that "recommendation," standing alone, would have been too weak to create a trust, and relied upon its being followed up by other precatory words, to wit: A special request that the executrix would provide for relatives of the deceased.

It is perfectly clear that the testator knew the distinction between a trust and a mere recommendation. In article 3 of his will he gives \$100,000 in railroad bonds to this same A. D. Tuttle, in trust, to pay over the income to a lady cousin; and in article 7 he gives property to Jerome Lincoln, in trust, to pay over the income to his wife and children. In article 4 he gives to his wife \$200,000 in railroad bonds, and recommends her not to dispose of them without the advice of a certain friend.

If the testator intended in article 6 simply to create a life estate in A. D. Tuttle, with remainder over, he would have adopted the forms familiar to every lawyer for creating such estates.

The conclusion of the court is that no trust is imposed by article 6 of the will, but that by its terms A. D. Tuttle takes one-half of the Jimeno Rancho as absolutely as his son takes the other half, and is entitled to a decree distributing the same to him immediately.

PRECATORY WORDS AND TRUSTS.

The Term "Precatory Trust" Defined and Explained.—Precatory words, as defined by Bouvier in his *Law Dictionary*, are expressions in a will praying or requesting that a thing be done, while, as defined by Burrill in his *Law Dictionary*, they are said to be words of entreaty, request, desire, wish or recommendation employed in wills as distinguished from direct and imperative words. Such words when addressed to a devisee or legatee will make him a trustee for the

person in whose favor they are used, provided that the testator has pointed out with sufficient certainty both the object and subject matter of the intended trust: See monographic note to *Harrison v. Harrison's Admx.*, 44 Am. Dec. 365.

In *Bohon v. Barrett*, 79 Ky. 378, the court, in discussing the nature and meaning of precatory trusts, said: "The doctrine of precatory trusts is well established. They grow out of words of entreaty, wish, expectation, request or recommendation frequently employed in wills. The meaning of the word 'precatory,' according to its ordinary use, does not embrace a command; it means beseeching; suppliant; prayerful. In its primal sense, as descriptive of an act relative to a right, it conveys the idea that the right is equivocal or uncertain, because it impliedly depends on the will of another, who is brought to exercise his power over it. If such power were natural or independent of the testator, then no command of his to exercise it could be enforced; but where the power or discretion is created by will, it is subject to such limitations as the testator sees proper to impose, and whatever may be the character of the words which he uses to indicate his will or wish, whether perceptive or recommendatory, they are imperative—the wish of a testator, like the request of a sovereign, being equivalent to a command."

"His wishes and desires as to the disposition of his property after his death constitute his will: *Bart v. Herron*, 66 Pa. 402. And, although such desire is not expressed in mandatory language, yet if from the language used it can be inferred, with reasonable certainty, what the desire of the testator is, it will be treated by the courts as his command and executed accordingly."

Likewise, in the well-considered case of *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, the court observed: "As to the doctrine of precatory trusts, it is quite unnecessary to trace its origin, or review the numerous judicial decisions in England and in this country which record its various applications. If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it 'precatory.' The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel or advice, intended only to influence and not to take away the discretion of the legatee growing out of his right to use and dispose of the property as his own. On the other hand, the language employed may be imperative in fact, though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary."

In considering the application of the doctrine of precatory trusts, it is well to bear in mind that it is generally not necessary that technical language be employed to create a trust, and that it is enough if the intention to create a trust is apparent from the will. Hence, it follows that precatory words—that is, words of recommendation, entreaty, request, wish or expectation—may be sufficient to create a trust in favor of the person or persons in whose favor they are used. The question with respect to the precatory words used being whether the precatory words are used with an intention to govern the conduct of the party to whom they are addressed or merely to indicate or suggest what he thinks would be a reasonable exercise of the discretion of the legatee or devisee in the use of the gift, but leaving it to the legatee or devisee to exercise his own discretion in the matter: *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. E. 155.

The doctrine of precatory trusts seems to be founded upon the rule of construction respecting wills, that the testator's intent, when ascertained, is to be carried out by whatever words conveyed. Consequently, as we have seen before, precatory words are treated as imperative and creating a trust where both the object and subject matter of the precatory words is certain unless a clear discretion or choice to act or not to act is given, or the prior disposition of the property imports an absolute or uncontrollable beneficial ownership: *Harrison v. Harrison's Admx.*, 2 Gratt. 1, 44 Am. Dec. 365.

Present Tendency of Courts Respecting Creation of Precatory Trusts.—There is considerable difference between the extent to which the earlier English and American cases went in sustaining the doctrine of precatory trusts and that which generally obtains at the present time with respect to such trusts.

Perhaps much of the confusion which exists among the authorities has been caused by the desire of the courts to follow strictly the intention of the testator in construing his will, and yet, on the other hand, not to declare the existence of a trust unless the intention to create a trust is clearly set forth.

The earlier English authorities were quite liberal in construing precatory words as creating a trust on the theory that the precatory words were a strong indication of the testator's intent as to the disposition which he willed, as a matter of fact, regardless of the courteous terms with which he expressed his will. In other words, the earlier decisions were rendered often on the tacit theory that precatory words, when addressed to near relatives or lifelong friends, were merely polite forms of couching a command.

This idea was shown to some extent in the oft-cited case of *Warner v. Bates*, 98 Mass. 274. The court in that case, in discussing the subject, said: "We see no sufficient ground for calling in question the wisdom or policy of the rule of construction uniformly applied to wills in the courts of England and in most of the United States, that words of entreaty, recommendation or wish addressed by a testator

to a devisee or legatee will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust, and the subject matter on which it is to attach or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by text-writers and in judicial opinions will be found to rest mainly on its applications in particular cases; and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construct words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed that the testator would do if he could control his action. But difficulties of this nature which are inherent in the subject matter can always be readily overcome by bearing in mind and rigidly applying in such cases the test that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is annexed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed; if the relations and situation of the testator and the supposed cestuis que trust are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory in the donee—the just and reasonable interpretation is, that a trust is created, which is obligatory, and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended.”

And in a recent case in California, that of *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846, the court, in adverting to the evolution of the doctrine of precatory trusts, said: “It appears from the early decisions in England that any and every precatory word was laid hold of to create a trust, but the modern cases in that country and the better considered cases in America have gone the other way, and the rule in California has been laid down that the ordinary and natural import of the words used will be followed, ‘unless a clear intention to use them in another sense can be collected and that other can be ascertained’: *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; *Civ. Code*, sec. 1324; *Shaw v. Lawless*, 5 Clark & F. 129; *Williams v. Williams*, L. R. 2 Ch. D. 12; *Pennock’s Estate*, 20 Pa.

268, 59 Am. Dec. 718; *Hess v. Singler*, 114 Mass. 56. In Story's *Equity Jurisprudence* (vol. 2, sec. 1069), Judge Story says: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish and desire into positive peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that in using the one and omitting the other he should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject as a pure matter of discretion to the goodwill and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation and other words precatory in their nature imply that very discretion as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense.'"

The early English and American authorities, together with the later authorities restricting the more liberal early English doctrine on this subject, were exhaustively discussed in the monographic note to *Harrison v. Harrison's Admx.*, 44 Am. Dec. 377.

In *Ellis v. Ellis' Admr.*, 15 Ala. 296, 50 Am. Dec. 132, the court, in an exhaustive opinion in which many of the more restrictive English cases were discussed, observed: "These authorities, with many others which might be cited, show the tendency of modern decisions in England not to extend this doctrine of implied trust from precatory words, but to go back as far as may be consistent with the current of their previous adjudications, to what I humbly conceive to be the true rule of interpretation—that is, to give such recommendatory expressions their natural, ordinary and familiar sense, and having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case. Thus, the court will execute the will of the testator, and not by a forced technical construction of his words, make a will for him."

Hence, it may be said that the modern tendency is to restrict rather than to extend the doctrine of precatory trusts, although where the subject and object of the trust are clearly defined in the precatory words or clauses, the courts will construe the will as creating what is commonly called a precatory trust: *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465; *Major v. Herndon*, 78 Ky. 123.

"Precatory words in testamentary instruments, that is words of request, desire, or recommendation, as distinguished from direct or imperative words, have been the subject of a vast amount of discussion. In former times the courts seem to have been disposed to lay hold of almost any precatory word to create a trust. In recent years, however, courts have, practically with unanimity, maintained that when property is given absolutely, a trust is not lightly to be imposed, upon mere words of request, recommendation, and confidence; and accordingly they have affirmed that such words will be given their ordinary and natural import, and not to be regarded as imperative, unless it is clear that the testator so intended them": 1 Ross on Probate Law and Practice, 76 citing *Kaufman v. Gries*, 141 Cal. 295, 74 Pac. 846; *Estate of Marti*, 132 Cal. 665, 61 Pac. 964, 64 Pac. 1071; *Estate of Buhrmeister*, 1 Cal. App. 80, 81 Pac. 752.

General Requisites of Precatory Terms.—A trust has been declared to be a relation between two persons, by virtue of which one of them (the trustee) holds property for the benefit of the other (the cestui que trust): *Corby v. Corby*, 85 Mo. 371. But it is not necessary to use the word "trust" or to direct property to be held in trust, since if from the language used, in view of the whole disposition of the estate, an intent and purpose may be reached which implies a trust, a trust will be implied: *Cockrill v. Armstrong*, 31 Ark. 580; *Hughes v. Fitzgerald* (Conn.), 60 Atl. 694. Hence, the rule is stated that no particular form of expression is required to create a precatory trust. Words of recommendation, request, entreaty, wish or expectation will impose a binding duty on a devisee or legatee by way of trust provided the testator has pointed out with sufficient clearness and certainty the subject matter and the object of the trust, nor will the fact that the testator's whole estate is disposed of in absolute terms before the precatory words occur in the instrument prevent the trust from attaching: *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786. See, also, *Quinn v. Shields*, 62 Iowa, 129, 49 Am. Rep. 141, 17 N. W. 437. In other words, the words may be precatory in form but mandatory in effect: *Dexter v. Evans*, 63 Conn. 58, 38 Am. St. Rep. 336, 27 Atl. 308.

In the leading English case of *Knight v. Knight*, 3 Beav. 172, the general rule was announced in the following language: "As a general rule, it has been laid down that when property is given clearly to any person, and the same person is by the giver, who has power to command, recommended or entreated or wished to dispose of that property in favor of another, the recommendation or entreaty or wish shall be held to create a trust: First, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."

In a comparatively recent case in New Hampshire it was held that precatory words in a will equally with direct fiduciary expres-

sions constitute a trust for the person in whose favor they are used, if from the whole transaction and the words used such a trust may be fairly implied: *Foster v. Willson*, 68 N. H. 241, 73 Am. St. Rep. 581, 38 Atl. 1003. Likewise it has also been declared that a precatory trust is created where it is clear that on the whole it was the intent of the testator to create a trust by the use of such words, and the words used show with reasonable certainty that the testator intended to control the legatee or devisee in the use and control of the property bequeathed or devised: *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155. And in an early case in Pennsylvania (*Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718), it was held that words in a will expressive of desire, recommendation and confidence are not words of technical but of common parlance, and that they are not prima facie sufficient to convert a devise or bequest into a trust, but that such words may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee or the ultimate disposition to his kindness, justice or discretion.

Necessity that Words have Imperative Meaning.—In order to create a precatory trust, the words used must be such that it will appear from them that they were intended in an imperative sense, and that both the subject and object of the recommendation or wish is certain: *McDuffie v. Montgomery*, 128 Fed. 105, citing *Cruwys v. Colman*, 9 Ves. 323; *Bland v. Bland*, 2 Cox Ch. 349; *Knight v. Knight*, 3 Beav. 179; *Flint v. Hughes*, 6 Beav. 342; *Fox v. Fox*, 27 Beav. 301; *Mills v. Newbury*, 112 Ill. 123, 54 Am. Rep. 213; *Warner v. Bates*, 98 Mass. 274. And to the effect that precatory words must be essentially imperative in their character or use in order to create a trust, see, also, *Bristol v. Austin*, 40 Conn. 438; *Hughes v. Fitzgerald* (Conn.), 60 Atl. 694; *Bohon v. Barrett's Exr.*, 79 Ky. 378; *Young v. Egan*, 10 La. Ann. 415; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155.

In the very recent case of *Burnes v. Burnes*, 137 Fed. 781, the court, in discussing the necessity for the precatory words to be used in an imperative sense, said: "There is a simple, sure and familiar form of bequest to raise a trust, which consists of a devise to the legatee in trust for the beneficiary, and a failure to use it indicates an intention to avoid the creation of a trust. Words of desire, request, recommendation or confidence in a will, addressed by a testator to a legatee whom he has the power to command, create no trust in favor of the parties recommended, unless (1) the intention of the testator to make the desire, request, recommendation or confidence imperative upon the legatee, so that he shall have no option to comply or to refuse to comply with it, clearly appears from the whole will and the relation and circumstances of the testator when it was made; (2) unless the subject matter of the wish or recommendation is certain; and (3) unless the beneficiaries are clearly designated. When these three conditions exist, a precatory trust may be raised.

The test of the creation of the trust is the clear intention of the testator to imperatively control the conduct of the party to whom the language of the will is addressed by the expression of the wish or desire, and not to commit to his discretion the exercise of the option to comply or to refuse to comply with the wish or suggestion expressed."

But, as was said by the court in *Russell v. United States Trust Co.*, 127 Fed. 445, "An expression may be imperative in its real meaning, although couched in language which is not imperative in form; and when it appears to have been used in this sense by the testator, the courts will give it due effect. If it is used by way of suggestion, counsel or advice, with a view to influence, but not to direct the discretion of the party, it will not raise a trust. Although a devise or bequest to one person, accompanied by words expressing a wish, entreaty or recommendation that he will apply it in whole or in part to the benefit of others, may create a trust, if the subject and object are sufficiently certain, they will not do so unless the words appear to have been intended by the testator to have been imperative; and when property is given absolutely and without reservation, a trust is not to be lightly imposed upon mere words of recommendation and confidence. These propositions are familiar in the law of recommendatory trusts, but in applying them the courts have sometimes implied and sometimes negatived the existence of a trust from the use of the same or equivalent terms, according to the light thrown on the intention of the testator by the various provisions of the will, and by such extraneous facts as have been considered material in interpreting them."

Necessity that Words be Certain as to Both the Subject and Object of Trust.—As has been seen from the foregoing section, besides the necessity for the precatory language to be imperative in effect, it is also essential in order to create a precatory trust that the precatory words point out with clearness and certainty both the object of the intended trust and the subject matter upon which it is to operate: *Harper v. Phelps*, 21 Conn. 257; *Lines v. Darden*, 5 Fla. 51; *Handley v. Wrightson*, 60 Md. 198; *Hess v. Sinler*, 114 Mass. 56; *Lucas v. Lockhart*, 10 Smedes & M. 466, 48 Am. Dec. 766; *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239; *Trustees of McIntire Poor School v. Zanesville Canal etc. Co.*, 9 Ohio, 203, 34 Am. Dec. 436; *Harrison v. Harrison's Admx.*, 2 Gratt. 1, 44 Am. Dec. 365.

The rule has, of course, been exemplified in many cases. Thus where an olographic will, after a devise of all the estate to the wife, provided: "If she find it always convenient . . . to give my brother E. W., during his life, the interest on \$10,000 (or \$700 per annum), I wish it to be done," it was held that the provision did not refer to the choice or preference of the devisee, but to her pecuniary condition each year, and hence that the intent of the testator was to charge the annuity upon the devise to the wife, provided that the payment in any year would occasion her no incon-

venience: *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411. And that a precatory trust is created by a clause in a will stating: "It is my wish and desire that my wife continue to provide for the care, comfort and education of T. J. M., now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, providing that he continue to be a dutiful child to her and shows himself worthy of consideration": *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786. And where, by a will, the wife was requested to pay a niece of the testator out of the residuary estate bequeathed to the wife, so much as she shall from time to time think best for the support and benefit of the niece, it was held that the court could ascertain the amount and decree the payment of a reasonable sum for such purpose where the wife fails to honestly and fairly exercise her discretion in the matter: *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490. But it was held in *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089, that a devise of real estate and a bequest of personal property "to my brother S. C., to be held, used and enjoyed by him, his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same, or so much thereof as he shall not have disposed of by devise or sale, shall descend to my three beloved nieces," naming them, creates no trust, executory or otherwise.

Distinction Between Precatory and Discretionary Trust.—From what has been said in the preceding part of this note, it will be observed that a precatory trust is merely a trust created by the use of precatory terms. Whether the precatory terms are sufficient to create a trust is simply a matter of construction of the precatory terms employed, in connection with the whole context of the will. The mode of carrying out the trust created by the employment of such precatory terms may be either mandatory or discretionary in the same manner as a trust created by terms other than precatory might be either mandatory or discretionary. It is of course, true that it may sometimes be difficult to determine whether the mode of carrying out a trust created by precatory terms is mandatory or discretionary, but that circumstance arises merely as a result of the employment of the recommendatory terms creating the trust, and not from any inherent quality of precatory trusts. A precatory trust, when its existence is once ascertained by the court, is enforceable in the same manner as any other trust is enforceable. It is the creation of the precatory trust itself, which must not be left to the discretion of the legatee or devisee, who is claimed to hold as a trustee and not the mode of enforcing the trust.

Post v. Moore, 181 N. Y. 15, 106 Am. St. Rep. 495, 73 N. E. 482, *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490,

and *McCurdy's Appeal*, 124 Pa. 99, 10 Am. St. Rep. 575, 16 Atl. 626, illustrate to some extent the distinction above stated.

Necessity for All Parts of the Will to be Considered.—The object of a judicial interpretation of a will is to ascertain the intention of the testator according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surround the testator when the instrument was framed: *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846; *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786. Hence it follows that in the construction of precatory terms, as in the construction of any part of a will, all the provisions and parts of the will must be considered in order to ascertain whether the precatory words are used with an intent of creating a trust: *Dexter v. Evans*, 63 Conn. 58, 38 Am. St. Rep. 336, 27 Atl. 308; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; *Negro Chase v. Plummer*, 17 Md. 165; *Carter v. Gray*, 58 N. J. Eq. 411, 43 Atl. 711; *Wood v. Seward*, 4 Redf. Sur. 271; *Cook v. Ellington*, 6 Jones Eq. 371; *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718; *In re Boiss' Estate*, 177 Pa. 190, 35 Atl. 724; *Hill v. Page* (Tenn.), 36 S. W. 735. And it was held in Pennsylvania that mere precatory words or words of command or of explanation in a will are not enough to create a trust or to establish an intention not to be gathered from a consideration of the operative words upon the face of the instrument, or, in other words, that the intent of the testator to create a trust must be apparent from the face of the will: *Boyle v. Boyle*, 152 Pa. 108, 34 Am. St. Rep. 629, 25 Atl. 494. Consequently, in ascertaining whether the testator intended to create a trust, the codicil may also be considered: *Wood v. Camden Safe Deposit etc. Co.*, 44 N. J. Eq. 460, 14 Atl. 885; *In re Keleman*, 126 N. Y. 73, 26 N. E. 968; *Cook v. Ellington*, 6 Jones Eq. 371. And likewise it has been held that for the purpose of ascertaining the testator's intent the whole will must be considered, including provisions admitted to be void: *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880. But it is said that in the construction of wills, the law in doubtful cases leans in favor of an absolute rather than a defeasible estate, of a vested rather than a contingent one, and of a distribution as nearly in accord with the general rules of inheritance as is possible: *Patton v. Ludington*, 103 Wis. 629, 74 Am. St. Rep. 910, 79 N. W. 1073.

Meaning to be Given to the Precatory Words.—In determining whether words used in a will are used simply as a suggestion or recommendation which may be obeyed or not obeyed, or as imposing a duty upon the legatee or devisee, the precatory words are to be understood in their natural and familiar sense: *Ellis v. Ellis' Admr.*, 15 Ala. 296, 50 Am. Dec. 132; *McRae's Admr. v. Means*, 34 Ala. 349.

But, of course, the words must be construed in connection with the whole will. Thus in *Good v. Fichthorn*, 144 Pa. 287, 27 Am. St.

Rep. 630, 22 Atl. 1032, the court said: "The true test of the effect of language at variance with other parts of the devise is, whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective; the latter rarely, if ever; the first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes.

"Applying this principle to the present case, it is clear, as already said, that the testator gave a fee simple absolute to his widow, repeated and reiterated, as if he wished to put it beyond all question. But it is also clear that he still thought it necessary, or at least permissible, for him to prescribe how it should be used. Therefore, he gives her all the rights and powers over it that he had while living, and in addition specifies the right to sell and convey, to make title, to use the proceeds, and lastly, as an adjunct to the will whose making he enjoins, 'the power and authority' to appoint one or two executors, as she may deem proper. It is true that the words he uses in regard to the making of her will, 'enjoin and direct,' are in their natural meaning mandatory and imperative; but coming as they do at the end, and in connection with the express enumeration of useless and superfluous powers, they indicate an intent to grant or withhold incidents of the estate already given."

Construction Given Various Precatory Terms in Common Use.—

The various apparently inconsistent decisions construing precatory words spring from the difference in the order of expression and the surroundings, which are seldom the same in any two cases; hence it is often said that every case must depend upon the construction of the particular word under consideration: *Bohon v. Barrett's Admr.*, 79 Ky. 378. Or, in other words, the difficulty with respect to precatory trusts is not as to what the rule is, but as to its application in the particular case on considering the whole will in that connection: *Noe v. Kern*, 93 Mo. 373, 3 Am. St. Rep. 544, 6 S. W. 239.

Hence no general rule can be laid down as to the construction of such precatory words as "wish," "desire," "recommend," "request" and the like, since the meaning to be given to such words depends entirely upon the manner in which they are used in connection with the other phraseology of the will.

In *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473, the court observed that a request made by one who has the right to direct is often, perhaps generally, interpreted as a command. So, also, it is said that express words are not necessary to create a trust by will, since, if from the language used, in view of the whole disposition of the estate, such an intention is manifest, a trust will be implied. The terms "wish and desire" may be sufficient: *Cockrill v. Armstrong*, 31 Ark. 580.

The use of the words "wish and will," and especially the word "will," were discussed quite elaborately by the court in *McRee's Admr. v. Means*, 34 Ala. 349. The court in that case said: "'Will' is sometimes used as the synonym of choice, wish, pleasure; but it is also used frequently in the sense of command, direction, determination and resolution. It has, when found in testamentary papers, a universally received mandatory signification. Swinburne's definition of a testament is 'a just sentence of our will, touching that we would have done after our death': 1 Swinburne on Wills, 4. Again, the same author says (page 19), 'the will or meaning of the testator is the queen or empress of the testament.' The same definition is also given by other authors: 10 Bacon's Abridgment, 479; Bouvier's Law Dictionary.

"In *Gilbert v. Chapin*, 19 Conn. 351, the word 'will' is used in contradistinction to precatory language, as will be seen by the following quotations: 'It is said that precatory language, or words of recommendation, are expressive of a testator's will and intention. It is true that such forms of expression declare a wish, a preference, but not a will in its appropriate sense. They express an intention, or rather a desire, not absolutely but with a qualification or condition that such desire shall nevertheless be subject to the future discretion and action of the devisee. And the distinction between this and an imperative direction, which, in legal parlance, is a will, is very intelligible and clear.' This extract indicates an opinion of the Connecticut court that 'will' is the antithesis of words of recommendation and request, not creating a trust, and carries with its use an imperative direction.

"The same meaning has also been attributed to the word in South Carolina where it is spoken of and distinguished from 'wish': *Brunson v. King*, 2 Hill Eq. (S. C.), 490. Chief Justice Marshall had the same view of the import of the word, for he said: 'The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be the declaration of a man's intentions, which he wills to be performed after its [his] death': 6 Bacon's Abridgment, 16; also, 2 Blackstone's Commentaries, 499; *Eels v. England*, 2 Vern. 466; *Forbes v. Ball*, 3 Mer. 436.

"The common acceptation of the word 'will' corresponds with the meaning adopted by law-writers. There is no other word of more common and familiar use to describe the mental operation involved in the act of making a bequest of property. While the books abound in cases where words less imperative than will have been held to create trusts, we have not found, and the industry of counsel has not produced, a single case in which 'will' has not been treated as mandatory. The word 'will,' we decide, therefore, ex

vi termini imports an obligatory direction by the testatrix." The court then held that the words "wish and will" had an imperative effect.

But in *Lines v. Darden*, 5 Fla. 51, the court, in discussing the effect of the words "will and desire" said: "The words 'will and desire' when addressed to an executor, are, as contended, imperative, and it is his duty to carry out the wishes of his testator, if possible, and when consistent with the will. The words are not necessarily addressed to the executor. The object to be performed will usually afford a safe guide in determining to whom they are addressed."

There are, however, numerous decisions in which the precatory words in common use have been construed, but such decisions can only, as a general rule, be of aid where the context is quite similar.

Thus, in *Re Whitecomb*, 86 Cal. 265, 24 Pac. 1028, the word "recommend" was construed as having been used in a strictly precatory character, with no imperative effect, while in *Eberhardt v. Perolin*, 48 N. J. Eq. 592, 23 Atl. 501, the same word was given an imperative effect.

In *McCurdy v. McCallum*, 186 Mass. 464, 72 N. E. 75, it was said that under the law of England the word "request," when used in a will, may be construed to be either mandatory or directory, depending upon the intent as gathered from the whole will, and it was construed in that case as creating a trust.

And in *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, the court observed: "It is an error to suppose that the word 'request' necessarily imports an option to refuse, and excludes the idea of obedience as corresponding duty. If a testator requests his executor to pay a given sum to a particular person the legacy would be complete and recoverable. According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator; as where a testator desired that all his just debts, and those of a firm for which he was not liable, should be paid as soon as convenient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter: *Burt v. Herron*, 66 Pa. (16 P. F. Smith) 400. And in such a case as the present, it would be but natural for the testator to suppose that a request, which, in its terms, implied no alternative, addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command. In such a case, according to the phrase of Lord Loughborough in *Malim v. Keighley*, 2 Ves. Jr. 333, 529, 'the mode is only civility.'" The clause of the will under consideration in the above case was, "I give and bequeath to my wife, E. W. C., all of the estate, real and personal, of which I shall die seised, possessed or entitled to. I recommend to her the care and protection of my mother

and sister, and request her to make such gift and provision for them as in her judgment will be best."

The word "request" was construed in *Barry v. Sturdivant*, 53 Miss. 491; *Schmucker v. Reel*, 61 Mo. 592; *Eddy's Exr. v. Hartshorne*, 34 N. J. Eq. 419; *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Wyman v. Woodbury*, 86 Hun, 277, 33 N. Y. Supp. 217; *Batchelor v. Macon*, 69 N. C. 545. And the precatory words "request and desire" in *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286; the words "requested and intrusted" in *Spurgeon v. Scheible*, 43 Ind. 216; the words "will and desire" in *Lines v. Darden*, 5 Fla. 51; *Cate v. Cranor*, 30 Ind. 292; *Reid v. Porter*, 54 Mo. 265; *Collins v. Hope*, 20 Ohio, 492; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; the words "wish and will" in *McBee v. Means*, 34 Ala. 349; the words "wish and desire" in *Phebe v. Quillin*, 21 Ark. 490; *Cockrill v. Armstrong*, 31 Ark. 580; *Cobb v. Battle*, 34 Ga. 458; *Barrett v. Marsh*, 126 Mass. 213; *Brasher v. Marsh*, 15 Ohio St. 103; the words "desire and request" in *Kauffman v. Griess*, 141 Cal. 295, 74 Pac. 846; the words "enjoin and direct" in *Good v. Fichthorn*, 144 Pa. 287, 27 Am. St. Rep. 630, 22 Atl. 1032; the words "on the trust and confidence" in *People v. Powers*, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502.

Although the word "wish" is a distinctly precatory term, still it very often is used in an imperative sense. The court, in *Russell v. United States Trust Co.*, 127 Fed. 445, in construing the word "wish" said: "The present case differs primarily from either of these cases, because the testator did not 'request' or 'direct' his wife, in referring to the future disposition of the property left to her. But this consideration is of little importance. Undoubtedly the word 'wish' may be equivalent to 'will' or 'request' or 'direct,' if the context justifies that meaning: *Bliven v. Seymour*, 88 N. Y. 469. In *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 739, 19 N. E. 411, it was given that meaning. But in both of these cases the context authorized the implication that it was used imperatively. So, also, the word 'wish' may be equivalent to 'request'; but the meaning of the word 'request,' standing alone, is indeterminate and depends altogether upon the context: *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572. Except that in this case, as in all of these cited, the testator used a word which may be regarded as imperative or as not imperative, these authorities do not assist the present decision. The testator's expression of a 'wish and expectation' that his wife should 'generously remember' his brother's children and 'such others as she may choose' when she should make her will is one of hope and confidence rather than of command. That he did not intend to use it in an imperative sense appears from the context, and the provision for the mother denotes the distinction which existed in his mind between words of command and words of recommendation. When he proposes to provide for his mother he 'requests his wife to pay to her or her caretaker an ascertainable

sum—such sum or sums as may be requisite for her every comfort.' This part of the clause may very properly be read as imperative. But when he refers to the persons mentioned in the latter part of the clause, he substitutes for the word 'request' the words 'my wish and expectation'—words which are calculated to appeal to her judgment rather than to coerce it. More significant, as indicating that he did not intend by these words to dictate the action of his wife, is the circumstance that he applies them alike to the children of the deceased brother and to 'such others as she may choose.' If the will had read, 'I request [or direct] my wife by her will to generously remember my deceased brother's children and such others as she may choose,' the wide latitude of discretion given to her would be quite inconsistent with an intention to dictate or command. As it does read, the language is more clearly indicative merely of suggestion and preference. It falls short of denoting any definite disposing intention in favor of the persons mentioned."

For instances where the word "wish" was construed as having been used in a mandatory sense, see *Phebe v. Quillin*, 21 Ark. 490; *Bohon v. Barrett's Exr.*, 79 Ky. 378; *Curd v. Field*, 103 Ky. 293, 45 S. W. 92; *Pratt v. Trustees etc.*, 88 Md. 610, 42 Atl. 51; *Bliven v. Seymour*, 88 N. Y. 469; *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411; *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57; *Cook v. Ellington*, 6 Jones Eq. 371; *Brasher v. Marsh*, 15 Ohio St. 103; *Appeal of Fox*, 99 Pa. 282; *In re Gaston's Estate*, 188 Pa. 374, 68 Am. St. Rep. 874, 41 Atl. 529.

And for instances where the word "wish" was construed as having been used in a precatory sense, see *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244; *Manners v. Philadelphia Library Co.*, 93 Pa. 165, 39 Am. Rep. 741; *Brunson v. King*, 2 Hill Eq. (S. C.) 483.

The words "wish," "desire," "command" or "direct" are said to be apt words in a will to show the intent of the testator to make a will: *Barney v. Hayes*, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282. But of course the expression of a "desire" that the one to whom a bequest is made shall make a certain testamentary disposition of part of the bequest may fall short of a "command or direction," and have merely a precatory effect: *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071. But the word "desire" is frequently used in a will with the intent of indicating a positive direction: See *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203; *Wood v. Camden etc. Co.*, 44 N. J. Eq. 460, 14 Atl. 885; *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633; *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57; *Appeal of Philadelphia*, 112 Pa. 470, 4 Atl. 4; *Oyster v. Knull*, 137 Pa. 448, 21 Am. St. Rep. 890, 20 Atl. 624. And likewise the word "desire" has been used in many instances for the purpose of creating a trust: See *Cockrill v. Armstrong*, 31 Ark. 580; *Major v. Herndon*, 78 Ky. 123; *Maught v. Getzendanner*, 65 Md. 527, 57 Am. Rep. 331, 5 Atl. 471; *Van Dyck v. Van Beuren*, 1 Caines, 84; *Riker v. Leo*, 115 N. Y. 93, 21 N. E. 719.

The term "requiring" was construed as creating a trust in *Curd v. Field*, 103 Ky. 293, 45 S. W. 92.

Effect of Words Indicating Merely Motive of Testator in Making Gift.—No trust can be implied merely from words indicating the motive which induced the testator in making the gift: *Randall v. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25 N. E. 780; *Small v. Field*, 102 Mo. 105, 14 S. W. 815. The application of the rule just stated arises in those cases where a devise is made to one standing in the relation of a parent, and makes some recommendation or request touching the maintenance of children, since such a recommendation or request relates, as a general rule, to the motive of the testator: *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54, 20 N. E. 264; *Seamonds v. Hodge*, 36 W. Va. 304, 32 Am. St. Rep. 854, 15 S. E. 156.

Effect of Words as Courteous Command When Addressed to Near Relatives or Intimate Friends.—Very often a testator, in formulating an imperative direction in a will, employs courteous precatory terms from a sense of delicacy when addressing such directions toward his wife or some near relative, but in such cases the context will generally show that an imperative direction was intended. It is quite likely that the doctrine of precatory trusts originally arose through an extensive use of such courteous forms of commands.

The Kentucky court, in *Bohon v. Barrett's Exr.*, 79 Ky. 378, in construing certain courteous language of a precatory character to amount to a trust, adverted to the reasons for the use of such language. That chivalrous court observed: "The language employed in defining the discretion of his brother is somewhat obscure and indirect, resulting from an attempt by the testator to maintain through his language a refined respect for his feelings, amounting almost to sentimentalism. A peculiar and sacred confidence must be presumed to have existed between them."

And in referring to the absence of specific directions the court said: "It requires no romantic stretch of the imagination to account for the use of general terms and the nonexpression of the particulars of the delicate confidence of brothers, born of the same mother, reared around the same fireside, and in manhood associated under the same roof until one is taken and the other left.

"And in view of their relations and the peculiar language of the will, which exalt this trust high above the usually guarded trusts, the slightest wish of the testator should be binding upon the conscience of his brother."

And in *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786, the court, in construing the effect of the words "wish and desire," said: "In considering this question it is to be remembered that the devisee is the wife of the testator, between whom it is not expected that commands would be expressed in such forcible language as between strangers: *Warner v. Bates*, 98 Mass. 274; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155."

Likewise in *Re Whitcomb*, 86 Cal. 265, 24 Pac. 1028, the court adverted to the fact that the word "recommend," when used toward a wife, might have a more binding force than when used toward an executor.

But in *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465, the court, in adverting to the use of precatory language toward a wife tending to limit the estate devised, said: "Nor is it doubted that it was within the power of the testator to place such a limitation upon the apparent devise in fee simple as to charge it with a trust in favor of another than the immediate devisee. Neither is it questioned that such a limitation might have been made in words not so full of harsh command, when addressed to his wife, as would seem neither rude nor inconsiderate if addressed to an executor or another not sustaining a relationship so near and sacred as that of wife. But we do not understand that language addressed to the wife, in form and substance advisory, will be construed as a command, simply because the relationship not only admits of, but would seem to suggest, words of tenderness and civility, when such construction would radically qualify other and clearly expressed purposes of the testator, and set at naught any of the other well-recognized canons of construction.

"In addition to the admitted rules of construction above stated, there is one fully settled in this state, that a devise in fee, clearly and distinctly made, cannot be taken away, cut down or modified by subsequent words not clearly and distinctly manifesting the testator's intention to limit such devise: *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 32 L. R. A. 298, 42 N. E. 277, 44 N. E. 17; *Ross v. Ross*, 135 Ind. 367, 35 N. E. 9; *O'Boyle v. Thomas*, 116 Ind. 243, 19 N. E. 112; *Bailey v. Sanger*, 108 Ind. 264, 9 N. E. 159."

Effect of Words Addressed to an Executor.—In an early case in New Hampshire, that of *Erickson v. Willard*, 1 N. H. 217, the court observed: "The words 'desire,' 'request,' 'recommend,' 'hope,' 'not doubting' that the executor will conduct in a specified manner, when they come from a testator who has the power to command, are to be construed as commands clothed merely in the language of civility, and they impose on the executor a duty which courts have in repeated instances enforced." And see, also, *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397, where the distinction as to the use of precatory terms addressed to a devisee and when addressed toward an executor is also recognized. And in *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071, the court, in discussing the effect of the word "desire" addressed toward the wife, who was named as his devisee, observed that "while the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms."

Effect of Words as Mere Suggestion to Influence Discretion.—As we have seen before, words indicating merely a wish or recommendation, and appealing to the discretion of a legatee, impose no legal obligation on him in favor of the person in whose behalf the words are used: *Wilde v. Smith*, 2 Dem. Sur. 93. Likewise a clause in a will stating that the testator would like his estate kept in a certain place, and as it was at his death, is held not to impose any duty: *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278.

Effect of Words as Dependent upon Status or Education of Testator. It would seem that it would be a circumstance to aid in the construction of a will that the will was an olographic one drawn by a testator unfamiliar with the meaning of the language employed by him, or, on the other hand, that the will was drawn by a lawyer who was familiar with the meaning of the language employed in the framing of the will.

This idea was considered of some weight in *Eberhardt v. Perolin*, 48 N. J. Eq. 592, 23 Atl. 501. In that case the court observed: "In the first place, the additional circumstances are to be noted that the will is an olograph, by a Frenchman who is plainly deficient in orthography and ability to properly punctuate his sentences and use capital letters, although his production, in many respects, exhibits intelligence and considerable thought, and also that, in the portion of the will which is offered for construction, he has plainly interlined immediately after the word 'instrument' at the end of the provision for the increase of the legacy to the Presbyterian church, these words, 'and her Plaisure if she My Wife feel dispose to do so but it is not obligatory,' following which, without intervening punctuation, are the words, 'Also to increase the donation,' etc., the word 'also' commencing with a capital 'A.' Upon a close inspection of the original will with the aid of a magnifying glass, I am satisfied that a long downward stroke, by way of punctuation, originally followed the word 'instrument,' but that when the interlineation was made it was written over in such a way as to make it run into, or constitute part of, the letter 'b' in the word 'obligatory.'" And in referring to certain words used by the testator in the precatory clauses of the will, the court further observed: "It is to be remembered that Vinot was born and reared in France, and that the English language was consequently not his native tongue. Many indications of his proneness to adopt his native language, a fact significant of his lack of familiarity with English, appear in his will. Under the circumstances we must not too readily assume that he meant to use the Saxon word 'gift' in its exact sense."

And in *Re Whitcomb*, 86 Cal. 265, 24 Pac. 1028, the will was an olographic one. The court, in construing the precatory clauses of the will, seemed to place some weight upon the fact that the testator was a lawyer and understood fully what language was necessary to vest a trust estate.

And in *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468, the court adverted to the fact that the testator was a lawyer, but it does not appear whether the will was olographic.

Effect of Varied Use of Words in Different Parts of Will.—As has been stated before, the whole context of the will is to be considered in construing the effect of the various precatory terms employed in the will.

The general rule as to the construction of precatory words was stated by the court in *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633, in construing the word "desire." The court said: "The rule that words occurring more than once in a will shall be presumed to be used always in the same sense unless a contrary intention appear by the context, or unless the words be applied to a different subject, laid down by Mr. Jarman (3 Jarman on Wills (R. & T.), 707), is founded on reason, and is in accord with the fundamental rule which requires us to seek from the language of a will the intent of the testator. There is nothing in the context to indicate that 'desire' was used in paragraph 3 in a different sense from that clearly indicated by its use in paragraph 4 and paragraph 7. In every case the word is applied to the same subject matter, that is, the disposition of parts of testator's estate. It follows, in my judgment, that 'desire' in paragraph 3 bears the sense of 'I direct,' as it evidently does in paragraphs 4 and 7."

Likewise in *Russell v. United States Trust Co.*, 136 Fed. 758, the court placed considerable weight upon the fact that different phraseology was used in different parts of the will. It said: "Where the whole instrument is considered, it is apparent that the testator has chosen different forms of expression for different objects, and it is fair to assume that his choice was intelligent. To his wife and daughter he wills and bequeaths two-thirds and one-third, respectively, of his real and personal property. When he is providing for the support of his mother and sister—an obligation to be immediately assumed—he, with full confidence, requests. When he refers to generous remembrance of the children of his brothers and others, such remembrance to find expression at some time in the future, which may be remote, he says, 'it is my wish and expectation.' Why did he change the form of expression? Why did he not with full confidence request that such remembrance be made? 'Wish and expectation' import hope, and 'hope' presupposes the possibility of disappointment. If the change of language was made with an intelligent purpose, it would seem that such purpose contemplated that over the wished-for remembrance of the nephews the sound discretion of the wife was to be more fully exercised than over the provision for the support of mother and sister. It may be that a disclosure of all the surrounding circumstances might induce a court to construe the words 'wish and expectation' as complainant contends they should be, but with nothing but the will before us, they cannot be given such meaning."

Effect Where Meaning of Precatory Words is Doubtful.—If there is doubt whether a testator intended by words of advise or recommendation to narrow an otherwise free and unfettered devise or bequest, the courts incline in favor of the absolute title of the devisee or legatee: *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298. See, also, *Barrett v. Marsh*, 126 Mass. 213, to the same effect.

Effect Where Precatory Words Follow an Absolute Bequest or Devise.—It is stated that a devise in fee, clearly and distinctly made, cannot be taken away, cut down or modified by subsequent words not clearly and distinctly manifesting the testator's intention to limit such devise: *Mitchell v. Mitchell*, 143 Ind. 133, 42 N. E. 465; *Second Reformed etc. Church v. Disbrow*, 52 Pa. 219.

And with respect to the use of precatory words or clauses immediately following an absolute disposition, the rule seems to be that the precatory words, under such circumstances, do not create a trust: *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286; *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190; *First Presbyterian Church v. McKallor*, 35 App. Div. 98, 54 N. Y. Supp. 740.

This rule was followed in *Post v. Moore*, 181 N. Y. 15, 106 Am. St. Rep. 495, 73 N. E. 482, where it was held if a will purports to devise all the testator's property to his widow, to have and to hold to her and her heirs and assigns forever, but states that it is testator's will and desire that she shall pay the sum of \$300 a year to his sister in law, no trust or power in trust is created in favor of the sister in law thereby.

So, also, it is said that where full discretion is clearly given to the legatee, the use of precatory words will not create a trust: *Corby v. Corby*, 85 Mo. 371. Hence the rule has also been stated that although expressions of a desire or a wish of the testator as to a specific disposition of his property, standing alone by themselves, may create a valid devise or bequest, still the rule is different where such expressions are employed after an absolute disposition of the property has been made: *Hopkins v. Glunt*, 111 Pa. 287, 2 Atl. 183.

The case of *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846, was an instance where a wife devised land to her husband in fee simple with an expression of "desire" and "request" that he should convey it to a Masonic lodge "in such manner and at such times as he may deem best," was held not to import a trust on behalf of the lodge.

And where a will, which after disposing of the residuary estate to the husband "absolutely" expresses a wish that he shall arrange his affairs so at his death "whatever may remain" of his property will go to the son of the testatrix, it was held not to create a precatory trust: *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244.

And where a will bequeathed a certain sum to two women as their absolute property, followed by a provision, "I request said Susan and Lucy to use said fund thus given to further what is called to Woman's Rights Cause. But neither of them is under any legal re-

sponsibility to anyone or any court to do so," it was held that no trust was created: *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473.

And likewise it was held that no trust was created where the estate was given to two youngest sons in fee simple, with a clause stating that "In making this disposition of my property I assume that my oldest son will understand and appreciate my reason for giving whatever property I may have had at my disposal to his younger brothers; and that they, on their part, will not fail to do for him and his family, all that, under the circumstances, the truest fraternal regard may require them to do": *Rose v. Porter*, 141 Mass. 309, 5 N. E. 641.

So, also, where it is apparent from the language of a will that it was the testator's intention to vest a fee in his daughters as to certain real estate, this intention is not to be controlled by the expression of a wish that the husbands of his daughters should not control the inheritance: *Ringe v. Kellner*, 99 Pa. 460. And where a father, by a clause in his will, gives his daughter \$10,000 and by another clause states that it is his "wish and desire" that she shall not consume the principal, but that at her death it shall go to certain devisees, it was held that the precatory clause did not limit the absolute gift to one for life only: *In re Heck's Estate*, 170 Pa. 232, 32 Atl. 413. And where a will gave the residuary estate to the wife "absolutely," with a request that she give to their son a certain sum or any sum she might think best, and also accompanied by a clause providing "I further request that she, my said wife, shall assist any of my brothers and sisters if they should be in need, and at her decease she should divide her property among them as she may think best," the court held that the precatory clauses created no trust in favor of the brothers and sisters: *McDuffie v. Montgomery*, 128 Fed. 105.

But it was held in a Missouri case that a precatory trust may be attached to property devised to another absolutely, provided that the intention to so change it appears from the will: *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239. And in an early case in Mississippi it was stated that though the language of a will may make an absolute gift, yet if other appropriate expressions be used which show with sufficient certainty that but a qualified gift was intended, a court of equity will look to the clear intent of the testator and raise a constructive trust where none had been expressly declared, but it also laid great stress upon the point that to raise a precatory trust the words of recommendation or of hope used by the testator must be certain both with respect to the object and subject of the intended trust: *Lucas v. Lockhart*, 10 Smedes & M. 466, 48 Am. Dec. 766. And in this connection see, also, *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718.

And in *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155, the will contained a clause stating, "I give, devise and bequeath unto my wife M., her heirs and assigns, forever, all my real and personal estate, . . . having full confidence in my said wife, and

hereby request that at her death, she will divide equally, share and share alike, in equal portions, as tenants in common between my sons and daughters [naming them] all the proceeds of my said property, real and personal, goods and chattels hereby bequeathed." The court, after an elaborate discussion of the subject, held that the widow obtained under the will a life estate coupled with a trust as to the remainder in favor of the children.

Effect Where Testator Declares that No Trust is Created by the Terms Used.—The rule seems to be that however strange the precatory language may be, that the courts will not construe it to create a precatory trust where the testator expressly declares that his precatory language is not intended to create a trust: *Ender's Exr. v. Tar Co.*, 89 Ky. 17, 11 S. W. 818; *Wood v. Seward*, 4 Redf. Sur. 271; *In re Havens*, 6 Dem. Sur. 456; *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541; *Toms v. Owen*, 52 Fed. 417; *Burnes v. Burnes*, 137 Fed. 781.

Precatory Clauses Relative to Persons Occupying Various Relations Toward the Testator.—Inasmuch as the decisions construing particular precatory terms and clauses are of controlling weight only when there is a striking similarity of the terms or clauses construed, and inasmuch as there may be a certain amount of similarity in all cases wherein the precatory terms or clauses were employed in behalf of persons occupying a similar state of relationship toward the testator, we have grouped the cases with respect to their reference to the persons upon whose behalf the terms or clauses were used.

Parents.—A clause in a will stating that "my mother is to have \$150 out of my estate annually as long as she lives and that she remain with my wife during the remainder of her life," imposes no charge upon testator's estate for the board of his mother: *Martin v. Goode*, 111 N. C. 288, 32 Am. St. Rep. 799, 16 S. E. 232. But if there is expressed a "wish and desire" in the will of a deceased wife that her aged, infirm and dependent father should, in case of need, be provided with a home and maintenance by her husband, the intention of the testatrix to provide for the maintenance of her father is apparent, and it must be held that the devise to the husband was made on the trust that he would furnish to the father during the latter's life should he need or require it: *Foster v. Willson*, 68 N. H. 241, 73 Am. St. Rep. 581, 38 Atl. 1003.

Children in General.—Where a will bequeaths an estate to three sons, but a clause states that having full confidence in such sons and their disposition to deal fairly, justly and liberally, testator leaves it to them to make proper and suitable provision for their sisters, it shows an intention on the part of testator to charge the estate on behalf of the sisters: *Cockrill v. Armstrong*, 31 Ark. 580. A devise to the wife "that she may dispose of the same as she may think best for herself and my children," and "to have and use as she may think best and proper for herself and my children," creates

in the devisee for the benefit of herself and the children: *Elliott v. Elliott*, 117 Md. 380, 10 Am. St. Rep. 54, 20 N. E. 264; *Kidder's Exr. v. Kidder* (N. J. Ch.), 56 Atl. 154. Likewise under a devise to a wife of all real and personal estate to do as she thinks best for the children, and in case she remarries, then she is to have a child's portion, it was held that the widow was a trustee for herself and the children: *Walker v. Quigg*, 6 Watts, 87, 31 Am. Dec. 452. And under a devise to a wife of all the estate "to be managed by her, and that she may be enabled the better to control and manage our children, to be disposed of by her to them in that manner she may think best for their good and for her happiness," the wife holds the property in trust, not for herself or the children alone, but for both to be managed at her discretion for the benefit of herself and the children: *Young v. Young*, 68 N. C. 309. A residuary clause in a will stating "all the remainder of my estate I leave to my wife Elizabeth to be divided among my children as she thinks proper," vests no beneficial interest in the wife, but only a trust for the benefit of the children: *Green v. Collins*, 28 N. C. 139.

The decisions above set forth providing for the maintenance of children are not strictly precatory clauses, and are more properly questions as to whether they constituted an express trust, but they will serve as comparisons with those decisions in which the language is more precatory in its nature.

A trust is created where a testator devises certain land to his wife in trust for the use of his two sons, the portion to one son being defined by specified boundary lines, and the other son to have the residue, but declaring that in the division of the land it was his wish to equalize them as near as possible, and "I trust to the sense of justice to my said sons that if I have given more to the one than the other that they will do right": *Hadley v. Hadley*, 100 Tenn. 446, 45 S. W. 342. And a bequest to a wife, her heirs and assigns forever, "having full confidence in my said wife and hereby request that at her death she will divide equally between my sons and daughters all the proceeds of my said property, real and personal, hereby bequeathed," gives the widow a life estate with remainder in trust for the children: *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155.

Some of the bequests and devises in which the welfare of the children is provided for are not strictly precatory clauses, but inasmuch as they are sometimes discussed from that standpoint, we will advert to them. Thus a bequest to a wife "during her lifetime for the support of herself and my children" was held not to create a precatory trust: *Billar v. Loundes*, 2 Dem. Sur. 590. So, also, a bequest to a wife "in full confidence that she, in her wisdom, will make every needful provision for my children," creates no trust: *Buffum v. Town of Tiverton*, 16 R. I. 643, 19 Atl. 112, 7 L. R. A. 386. Neither will a clause stating, "I devise all my estate to my beloved wife feeling entire confidence that she will use it judiciously for

the benefit of herself and our children," create any trust: *Lesesne v. Witte*, 5 S. C. 450. And likewise a clause stating, "I desire that the land and other property remaining shall continue in the possession of my wife L. during her life, believing she will make use of it for the benefit of our children as well as her own comfort. At her death I wish the property sold and an equal division made," was held not to create a trust: *McCreary v. Burns*, 17 S. C. 45. And a will giving property to the wife, "having the fullest confidence in her capacity, judgment, discretion and affection to properly bring up, educate and provide for our children and to manage and dispose of my said property in the best manner for their interests and her own," creates no trust: *Hunt v. Hunt*, 11 Nev. 442. So, also, a bequest to the wife of real and personal estate "in her own right in fee simple" with a clause stating, "I only make this request of her and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz., that in the event she should marry again, she will see that the interests of our children in said property are protected," was held not to create a trust in favor of the children: *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468. And where a will gave to the children of the testatrix an absolute estate in lands, share and share alike, and then expressed a desire that the children should live together and use the income of the property only for ten years, it was held that no trust was created by the precatory clause: *Clark v. Clark*, 99 Md. 356, 58 Atl. 24.

A bequest to a wife "to her own use and benefit as she shall deem best for herself and our beloved daughter" creates no trust in favor of the daughter: *Bulfer v. Willigrod*, 71 Iowa, 620, 33 N. W. 136. And a clause stating, "I lend to my wife, during her life, all my negroes, for the purpose of raising and educating my two sons," then giving in appropriate terms the remainder of his estate to his wife as guardian of his sons, was held not to create a trust in behalf of the sons with respect to the negroes: *Mason v. Sadler*, 59 N. C. 148. A clause in a will stating, "All the balance of my estate . . . I direct be and remain in the possession of my wife and children for their support and the education of my children, and as my children shall arrive at age or marry, I desire that my wife shall advance to such child or children such an amount . . . as she deems prudent, but not exceeding a distributive share of my estate, as it is my intention for my said wife to keep as much of my estate as will make her comfortable during her widowhood; but should she marry again, then she is to have no part of my estate," was held to create no trust: *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. 902. And no trust was created where a testator devised his residuary estate to his wife and stated it was given to her to the end that she might provide a home where she could receive the children, and that he was confident that it would be equally divided among all of them when she no

longer needed it: *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449. So, also, an absolute devise in fee of certain land to testator's wife followed by a clause stating, "It is my request and wish that she will . . . make such provisions by will or otherwise . . . that my son W. may share equally of the estate . . . willed to her, with my other children," was held to create no trust in favor of the son: *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465. And where testator devised certain land to his son declaring that it was his earnest request that such son, if he should die without issue, should give the land or its value to testator's daughter, W., if living, and, if not, to her children, it was held insufficient to raise a trust: *White v. Irvine*, 24 Ky. Law Rep. 2458, 74 S. W. 247. And so, also, where testator devised land to his son absolutely, a subsequent clause requiring all of his children, if any should die without issue, at their death, to will the property received from his estate to testator's surviving children, or the issue of those dead, it was held not to raise a precatory trust: *Igo v. Irvine*, 24 Ky. Law Rep. 1165, 70 S. W. 836.

A bequest of unimproved land, which was of little benefit without the power of disposition, to the wife "in her own name and for her own purposes, with only the condition that" at her death she "make an equal division of her estate to such children as shall survive her, or their representatives," was held not to create a trust: *Sears v. Cunningham*, 122 Mass. 538. And no trust was created where the residuary estate, real and personal, was devised to the wife "to have and to hold the same to her, her heirs and assigns forever," with a request that she should devise the property to his children: *Street v. Gordon*, 41 App. Div. 439, 58 N. Y. Supp. 860. And a devise of "all the rest and residue of my property . . . to my dear wife . . . believing that she will manage it judiciously, and perfectly satisfied that she will make a fair distribution of it among our children at her death," creates no trust: *Cheston v. Cheston*, 89 Md. 465, 43 Atl. 768. And where a will provided, "After the payment of my just debts, I give, devise and bequeath all my estate, real and personal, to my wife A., to her and her heirs, forever, recommending to her to give the same to my children at such time and in such manner as she should think best," it was held that the widow took an absolute estate in fee simple: *Gilbert v. Chapin*, 19 Conn. 342. So, also, where the testator willed to his wife his real estate "during her natural life," and his "personal estate of every description . . . absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly, among my children," it was held that the absolute ownership of the personal property of the testator was given to the widow with an expression of mere expectation that she will use and dispose of it discreetly as a mother: *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718. And a will which, after disposing of the residuary estate to the husband "absolutely," expresses a wish that he shall arrange his affairs, that at his death "whatever may remain" of his property will go to the son of the testatrix, does not create a trust: *Nunn v.*

O'Brien, 83 Md. 198, 34 Atl. 244. And a bequest to two sons "assuming" that they will do for another son and his family "all that the truest fraternal regard may require," creates no trust: *Rose v. Porter*, 141 Mass. 309, 5 N. E. 641. So, also, where a bequest to an eldest daughter "to dispose of as she may deem best for my daughters," naming certain younger daughters, it was held that the eldest daughter took an absolute estate in fee simple: *Hughes v. Fitzgerald* (Conn.), 60 Atl. 694. And a bequest to each of four adult children with the residue to the widow, "requesting her that she will so dispose of the property at her death as to make my youngest son S. an equal legatee with the balance of my children, was also held to create no precatory trust: *Speairs v. Ligon*, 59 Fed. 233. A devise of all testator's property to his son who had taken care of him for several years, and reciting that it was made principally in consideration of such services, but expressing a wish that the son would do what was right by his brothers and sisters with respect to the residue, if any remained after a just compensation for such services, was held to create no trust in the absence of fraud: *Whitesel v. Whitesel*, 23 Gratt. 904.

A devise to grandchildren in fee, but "admonished" and "charged" that the gift was made "in the hope and upon the trust that they will provide for their parents during their lives," was held to create no trust: *Arnold v. Arnold*, 41 S. C. 291, 19 S. E. 670.

Step and Adopted Children.—A will directing the income of an estate to be paid to the husband during life, "in the full confidence that he will, as he has heretofore done, continue to give and afford my children (by a former marriage) such protection, comfort and support as they or either of them may stand in need of" creates no trust: *Warner v. Bates*, 98 Mass. 274.

But a precatory trust is created by a clause in a will stating, "It is my wish and desire that my wife continue to provide for the care, comfort and education of T. J. M., now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, providing that he continue to be a dutiful child to her, and shows himself worthy of such consideration": *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786.

Grandchildren.—Where a testator by one clause gave the residue of his estate to his daughter and "to her heirs and assigns forever," and in a subsequent clause stated "I commit my granddaughter . . . to the charge and guardianship of my daughter S. L. C., in whose honesty, goodwill and integrity I repose the utmost confidence. I enjoin upon her to make such provision for said grandchild out of my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate," it was held that the daughter took an absolute title to the residuary estate, and that the

provision for the granddaughter was left wholly to the discretion of the daughter: *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144. But it was held where a testatrix devises all her estate to her son with a provision that out of his inheritance he "is desired by his mother" to pay, as soon as possible, \$500 to his grandniece because of the kindness bestowed upon testatrix by the grandfather of said grandniece, that grandniece was entitled to the gift: *In re Copeland*, 38 Misc. Rep. 402, 77 N. Y. Supp. 931.

But where a will provided, "I . . . give and bequeath all my property, real and personal, to my beloved wife, only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good," it was held to create no trust: *Foose v. Whitman*, 82 N. Y. 405, 37 Am. Rep. 572. And where a bequest was made to three daughters of certain personal property to be equally divided, with a request for them to bequeath such articles to his grandchildren, the request creates no trust: *In re Whelen's Estate*, 175 Pa. 23, 34 Atl. 329. So, also, where a clause gave an estate to a daughter during her natural life, and at her death directed the same to be equally divided among her children, and by another clause expressed his "will and desire" to be that should either of the grandsons arrive at twenty-one, or granddaughters marry previous to the death of the daughter, that they should receive a portion of the estate as a loan, to have the management and receive the benefit of the same until the final distribution, and then return the same for division, it was held that it created no trust in favor of the grandchildren: *Lines v. Darden*, 5 Fla. 51. And likewise a devise of a farm to a son and daughter equally, "to them, their heirs and assigns forever, hoping and believing they will do justice hereafter to my grandson D., to the amount of one-half of the said homestead farm" was held to create no trust in favor of the grandson: *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397.

Brothers and Sisters.—A trust is created by a devise of "all the rest and residue of my estate, both real and personal, . . . to my two brothers, A and B, whom I appoint my executors, with full confidence that they will settle my estate according to my will, and that they will dispose of such residue among our brothers and sisters and their children as they shall judge shall be most in need of the same": *Bull v. Bull*, 8 Conn. 47, 20 Am. Dec. 86. Likewise a trust is created in favor of a brother by a clause in the will stating that, "having and reposing implicit confidence in the goodness and kindness of my dear wife, I rely on her to make all needful provisions for the future wants of my brother": *Blanchard v. Chapman*, 22 Ill. App. 341.

But a provision in a will requesting the sole legatee to give to the sisters of the testatrix "any presents she may need and that my estate can afford" is too indefinite and uncertain to create a trust in favor of the sister: *Webster v. Wathen*, 97 Ky. 318, 30 S. W. 663. And a residuary devise to the son, "his heirs, and assigns forever, to

his and their own use," subject to a charge for the support of wife and the sister of testator, with a clause signifying a "desire and hope" that he would "so provide by will or otherwise that in case he shall die leaving no lawful heirs living" such residue "shall go in equal shares" to certain named relations of the testator, including brothers, sisters and cousins, was held to create no trust in favor of the relations: *Hess v. Singler*, 114 Mass. 56. And a clause stating, "I hereby will and bequeath unto my beloved wife A my whole estate, real and personal, after the payment of my just debts, recommending to her at the same time to make some small allowance at her convenience to each of my brothers and sisters, say to each \$1,000," does not create a trust in favor of such brothers and sisters: *Ellis v. Ellis' Admr.*, 15 Ala. 296, 50 Am. Dec. 132.

A clause stating "it is my wish that such property as my wife may have remaining undisposed of at her death that she should previously will the same to her sister, and to my brothers and sisters in equal proportions, leaving it entirely with her to make such disposition of her property by will as her judgment shall dictate, merely expressing my desire in the premises; and should she prefer to retain or dispose of the property so conveyed and devised to her, in a manner different from my wishes as herein expressed, she is at full liberty to do so, without having her right or motives for so doing called in question," does not create a trust: *Toms v. Owen*, 52 Fed. 417. So, also, where a will gave the residuary estate to the wife "absolutely," followed by a clause stating, "I further request that she, my said wife, shall assist any of my brothers or sisters if they should be in need, and at her decease she should divide her property among them as she may think best," it was held that no trust was created in favor of the brothers and sisters: *McDuffie v. Montgomery*, 128 Fed. 105.

Nephews and Nieces.—A trust is created by a clause stating, "I give, devise and bequeath unto my husband . . . all my real and personal estate absolutely. . . . I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have undertaken to raise and educate": *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239. And a clause stating, "I desire that the said J. W. should, at his discretion, appropriate a part of the income of my estate aforesaid, not exceeding \$50 a year, to the support of the widow of M. E.," my sister's daughter, coupled with other expressions, was held to create a trust: *Erickson v. Willard*, 1 N. H. 217. The case of *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527, was also an instance of a trust for the maintenance of a sister and niece.

But where the testator devised his whole estate to his wife, and requested that if she should not require the whole of the estate as a support, she should will the remainder at her death to the children of testator's brother, it was held that no precatory trust was created: *Bryan v. Milby* (Del.), 24 Atl. 333.

And no trust is created by a clause stating, "And it is my wish and expectation that when my wife J. shall make her will disposing of the property left her by me that she will generously remember the children of my deceased brother W. and such others as she may choose: *Russell v. United States Trust Co.*, 127 Fed. 445. The case of *In re Whitecomb's Estate*, 86 Cal. 265, 24 Pac. 1024, referred, in addition to a request for a disposition to a college, to a disposition in favor of a grandnephew.

"*Relations*," "*Near Relatives*," "*Blood Relations*," and "*Kinsfolk*."—No trust was held to be created by a will which, after giving the estate to the wife for life, recited that after providing for her own wants and comforts she should, in her discretion, "give to such of my relations such aid or assistance as my wife may, of her own will, think proper and just": *Corby v. Corby*, 85 Mo. 371.

But a trust was held to be created where the testator gave the residue of his estate to the wife "in good faith, believing that she will make a will and thereby distribute so much of the last-named legacy among my near relatives as she may not use for comfortable maintenance; and it is my will that my said wife shall make such distribution": *Cox v. Wills*, 49 N. J. Eq. 130, 22 Atl. 794. Though a trust is not created by a clause stating, "I expect and desire that my said wife will not dispose of any of said estate by will in such a way that the whole that might remain at her death shall go out of my family and blood relation": *Matter of Gardner*, 140 N. Y. 122, 35 N. E. 439.

A provision in an olographic will stating, "I have spoken of all my property to be divided in this will . . . without making any outside bequests. I want to give to my wife an executrix's power to give out of my estate, before division, as much as \$15,000 of bequests to my kinsfolk: Say to W. \$5,000 or \$10,000, in her discretion, and the balance to some one else who may be in need," was held to create a trust to the extent of \$5,000; *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288.

Brothers and Sisters in Law.—A bequest to a wife of \$10,000, "which I desire her to use for the benefit of her brothers and sister, according to her best judgment and discretion, which is to be paid after the discharge of the debts," was held to create no trust: *Jacob v. Macon*, 20 La. Ann. 162. See, also, *Post v. Moore*, 181 N. Y. 15, 106 Am. St. Rep. 495, 73 N. E. 482.

In *Tom v. Owen*, 52 Fed. 417, the husband had conveyed all his property to his wife, merely reserving a life estate. Subsequently he made a will stating that he wished to avoid all questions that might arise about the previous deed. He devised all the estate to her, and provided that his wife "should make free use of all the property so conveyed and devised to her for her own use, or for charitable purposes, knowing, that in case any of my immediate relations, or her sister, should, by any misfortune, or otherwise, need any assistance, she would generously share with them, and therefore

I feel no hesitation in leaving with my wife the power to carry out the wishes as expressed herein," the court held that no trust was created.

Poor or Needy Relations.—In some of the clauses which we have adverted to, it will be observed that the bequest was made with a request that provision be made for such of the testator's relatives, sometimes naming the particular degree of relationship, as should be in need, or require assistance and similar phrases. For instance of such phrases, see *Bull v. Bull*, 8 Conn. 47, 20 Am. Dec. 86; *Blanchard v. Chapman*, 22 Ill. App. 341; *Webster v. Wathen*, 97 Ky. 318, 30 S. W. 663; *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190; *Willets v. Willets*, 35 Hun, 401; *Tom v. Owen*, 52 Fed. 417; *McDuffie v. Montgomery*, 128 Fed. 105.

Servants and Strangers.—Where a will, after giving the estate to the wife, provided: "It is my desire that it may suit her pleasure, and if so, I request, but without intending to create a trust therefor, that she allow and pay Ann Tarco, a mulatto, who has been for some time in our service, \$15 per month for life, for her support." The will also provided that in case the wife did not survive him, he gave the estate to an adopted daughter, charged with the payment of \$15 to said mulatto. The wife survived him, and it was held that no precatory trust was created: *Ender's Exr. v. Tarco*, 89 Ky. 17, 11 S. W. 818.

But in *Chambers v. Davis*, Phil. Eq. (62 N. C.) 152, 93 Am. Dec. 605, a trust was held to have been created where the testator recommended in his will a certain person to the humanity of his executors, and also in the will specified a sum to be set apart, the interest of which was to be for the support of the person so recommended, who was a slave, during his life.

Precatory Terms Relative to Charitable, Educational, or Other Public Uses.—A bequest to executors "in their own right, trusting, nevertheless, and believing that, under a proper sense of their obligation to their own consciences, and their accountability to God, they will pay over and contribute the same to charitable objects," creates no trust: *Frierson v. General Assembly of Presbyterian Churches*, 7 Heisk. 683. So, also, a statement that testator relies upon the legatee to dispose of money for the benefit of such charitable and benevolent and educational purposes as legatee shall judge will most promote the comfort and improve the condition of the poor, or of testator's descendants, if they become poor and needy, creates no trust: *Willets v. Willets*, 35 Hun, 401.

The case of *In re Ingersoll*, 59 Hun, 571, 14 N. Y. Supp. 22, was an instance of a bequest to an executor for church purposes, the testator stating what he desired, but the court held that no trust was created. And in *Eberhardt v. Perolin*, 49 N. J. Eq. 570, 25 Atl. 510, the precatory clause construed also had a recommendation respecting an

increase of a fund toward a church, though the case seems to have been fought on other lines.

And where a will provided, "I give to my nephew . . . and to his son all my interest, either real, personal or mixed, in the Jimeno Ranch. . . . And I recommend to my said nephew to leave his portion thereof after his own death, and the death of his wife" to his son and his children, or descendants, and, in default of such, to Harvard College, the court held that no trust was created in favor of the college: *In re Whitcomb's Estate*, 86 Cal. 265, 24 Pac. 1028. In the case of *Succession of Hutchinson*, 112 La. 656, 36 South. 639, the bequest was to a university for the sole benefit of its medical department. The will contained numerous recommendations, but they were held not to amount to conditions. A somewhat similar bequest was made in *Pratt v. Trustees*, 88 Md. 610, 42 Atl. 51, where the residuary estate was given to an insane asylum. One clause of the will stated that, while testator did not wish to alter the management of the asylum, it was his "wish and will" that the estate given be used to complete the present buildings, etc. The court held that no trust was created.

A bequest to a city "with the request that the same be expended, if such is sanctioned by law, in the erection of a drinking fountain in the city," does not create a precatory trust: *In re Crane's Will*, 159 N. Y. 557, 54 N. E. 1089. So, also, where, in making a bequest for the erection of a soldiers' and sailors' monument, the testator stated that his "desire" was that it should be erected on a particular triangular piece of ground in the town, it was held that the desire was not imperative: *In re Ogden*, 25 R. I. 373, 55 Atl. 933.

A bequest of a certain sum to two legatees "as their absolute property," followed by clause "I request said [legatees] to use said fund thus given to further what is called the 'Woman's Rights Cause'; but neither of them is under any legal responsibility to anyone, or any court, to do so," creates no trust: *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473.

And a bequest to a publication society of a church organization, charging the society with the duty of using the gift in counteracting "the unscriptural, unreasonable and pernicious doctrine of the immortality of the soul" was held not to create a trust: *Pierce v. Phelps*, 75 Conn. 83, 52 Atl. 612.

ESTATE OF JAMES MCGINN, DECEASED.

[No. 7054; decided May 21, 1889.]

Costs and Counsel Fees.—Code of Civil Procedure, Section 1021, discriminates between counsel fees and costs.

Words and Phrases.—In **Defining Words and Phrases**, Code of Civil Procedure, section 16, means words are construed according to the text (here of the statute) and the approved usage of the language.

Costs—Whether Include Counsel Fees.—The probate statutes in speaking of costs mean simply the costs of the court, the expenses incidental to the proceedings in the case, apart from counsel fees.

Will Contest—Costs and Counsel Fees.—Counsel fees in a will contest have no proper place in a bill of costs, and may be stricken out on motion.

As will appear from the opinion, the question before the court was whether an attorney fee could be taxed as costs by the successful contestants to a will after original probate. It was contended that section 1332, Code of Civil Procedure, sanctioned such an expense as costs because the first sentence of the section providing for the case of an unsuccessful contest used the words "fees and expenses" simply, although the second sentence, as to a successful contest, used the single word "costs." But the court granted the motion to strike from the cost bill the item of counsel fee.

P. Reddy, for motion.

J. L. Crittenden, contra.

COFFEY, J. In section 1021, Code of Civil Procedure, the distinction is drawn between counsel fees and costs. "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, expressed or implied, of the parties; the parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided." That clearly discriminates between what is meant by costs and what is meant by counsel fees.

Section 16, which defines words and phrases, reads: "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and ap-

propriate meaning in law, or are defined in the succeeding sections, are to be construed according to such peculiar and appropriate meaning or definition." It means that words and phrases are construed according to the text and the approved usage of the language.

Section 1332 reads: "Costs and expenses, by whom paid." "The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed." That is the first sentence; the second sentence reads: "If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the Court directs."

The word "costs" has a well defined meaning.

Mr. Crittenden.—We claim it means fees and expenses.

The Court.—Yes, sir, I understand. That is just what I am coming to. Words and phrases are construed according to the text. What is the text? "The fees and expenses must be paid by the party contesting the validity or the probate of the will, if the will in probate is confirmed." Why does the very next sentence use a different and a single word? "If the probate is revoked, the costs—" Why not repeat the words, "fees and expenses"? Why put in there another, a different word? I really do not think that the legislature meant anything more by "fees and expenses" than costs—that there should be some intention to restrict the charge upon the estate in case the will should be revoked after having been once probated; that it should be restricted to costs. The preceding section and all the sections of the statute, so far as I have examined them, which speak of costs mean simply the costs of the court, the expenses incidental to the proceedings in the case, apart from the counsel fees; and the section which remits the costs of contests in will cases to the category of civil actions shows that the principle maintained in such cases should govern this; and, therefore, as no counsel fees are allowed in any civil action, none should be allowed to be paid in the case of a contest; and if there be any distinction or discrimination in favor of the executors, it is dependent upon the precise letter of the statute which gives to the court expressly the right to award to the executor

or administrator reasonable counsel fees. Section 1718 gives to the court the discretion to award a counsel fee for an appointed attorney, to be paid out of the estate primarily, and ultimately to be charged against the interest represented by the appointee.

Therefore, I do not think the counsel fee has any proper place in a bill of costs, and the motion to strike it out is granted.

ESTATE OF JAMES MCGINN, DECEASED.

[No. 7054; decided December 30, 1889.]

Will Contest—Costs.—Fees of Jury, Clerk, Sheriff and Shorthand Reporter taxed as costs of contestants upon revocation of probate of will.

Will Contest—Costs—Mileage of Witness.—Mileage from San Luis Obispo to San Francisco and return disallowed as costs; it appearing that the residence of witness more than thirty miles distant from place of trial, and that he, although demanding and being refused his fees, nevertheless voluntarily attended.

Will Contest—Costs—Witness Fees.—A witness coming from San Luis Obispo to San Francisco (not obliged to attend) only allowed two days' fees; reduced from claim of six days.

Will Contest—Costs—Witness Fees.—Parties contestant to a proceeding to revoke the probate of a will are not entitled to witness fees for testimony in their own behalf, nor to mileage.

Will Contest—Costs.—Fees of "Expert" Witnesses cannot be taxed differently from those of other witnesses, as the court has no power under the statute to allow other than ordinary witness fees.

Will Contest—Costs—Service of Subpoenas.—Item in cost bill, service of twenty-seven subpoenas at \$1.50 each, disallowed; no return of service having been made, and it not appearing by whom served, and charge being in excess of fee bill.

Will Contest.—Items in Cost Bill for Alleged Taking of Depositions disallowed, upon objections that alleged witnesses appeared at trial, that alleged depositions never returned or filed, and that items were excessive.

Will Contest.—Item in Cost Bill of Attorney Fee of Contestant upon revocation of probate of will disallowed as improper; construing Code of Civil Procedure, section 1332 with sections 1716 and 1021.

The opinion of the court was delivered upon a motion to tax costs. The motion was made upon behalf of the proponents of the will, as to the memorandum of costs and dis-

bursements filed by the contestants upon the revocation of the original probate. The motion separately submitted by P. Reddy and W. H. Metson (dated May 1, 1889), as representing the proponents other than the executors, is taken for reference to the objections considered by the court because of its great particularity and formal specification, consisting of forty-eight distinct objections to the various items claimed, and covering twenty-four pages of typewritten matter, with five additional pages of an affidavit in support thereof.

The objections in the motion involving propositions of law, and specially passed upon in the opinion, are particularly referred to as calculated to more fully elucidate the court's opinion, when read in connection therewith, viz.: Third objection, that mileage and expenses of witness from San Luis Obispo and return, unreasonable, illegal and unjust; witness appeared voluntarily, and his deposition might have been taken in county of residence. (See syllabus No. 2, also No. 3.)

Objections Nos. 9, 11, 12, 18, 28, 31, 39: That witness one of the parties contestant, and so not entitled to any fees at all; also, never served with subpoena, but appeared and testified voluntarily. Same as to mileage and expenses of one of parties from county of residence. (See syllabus No. 4.)

Twenty-ninth, fortieth and forty-first objections: That witness not paid by contestants the sum claimed, and not entitled to any sum other than \$2 per day for witness fees, whether an expert or otherwise. (See syllabus No. 5.)

Forty-second objection: That no subpoenas returned; charge of \$1.50 for each alleged service unreasonable, illegal, excessive and unjust, and should not be in excess of twenty-five cents for each service, and no fees allowable for any service, except where returns actually made and filed in court. (See syllabus No. 6.)

Objections Nos. 43, 44, 45 and 46, as to items for taking depositions: That depositions never returned or filed; witness appeared at trial and testified; and charge excessive, illegal, etc., and improper in excess of twenty cents for each folio transcribed. (See syllabus No. 7.)

Forty-seventh objection, as to contestants' attorney expense: That (inter alia) said item improper in a bill of costs,

and no part of an attorney's fee taxable as costs. (See syllabus No. 8.)

Service of subpoenas (see syllabus 6) : By Statutes 1871-72, page 776, sheriff's fees twenty-five cents, and for each mile in going (only) twenty-five cents, includes certificate of service.

Taxation of the costs (see syllabus 9) : Should be against the estate. The resistance to the contest made in good faith: Code Civ. Proc., secs. 1332, 1720.

The provisions giving the rule as to party liable for costs taxed up in contestant's favor upon a revocation of the original probate of a will (syllabus 9) : The only provisions of the probate statute appear to be the two sections cited by counsel, *supra*; as to which it may be noted that section 1332, by its terms, provides for this very case and for no other (see *Tiffany's Estate*, May 21, 1888, *Coffey, J.*, above); and that section 1720, which is a general section forming part of the omnibus chapter at the end of the general probate statute, can only be considered as applying to the subject matter of section 1332, *semble*, upon the ground that it is a case "not otherwise prescribed in this title." The two sections are quoted, *viz.* :

"Section 1332. The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs."

"Section 1720. When it is not otherwise prescribed in this title, the superior court, or the supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the superior court."

P. Reddy and W. H. Metson, for respondents, Johanna McGinn, and others.

James F. Smith, for executors.

James L. Crittenden, for contestants.

COFFEY, J. 1. The cost bill is retaxed as follows:

Reporter's fees as charged, subject to such abatement as may be authorized by payments already made by executors.

Jury fees and clerk's and sheriff's fees allowed.

2. Marcus Harloe, witness, mileage disallowed.

3. Witness fees are allowed as follows: (Here follows a long list of witnesses with number of days allowed each, all at \$2 per day, not necessary to be copied.)

4. The following items are disallowed in toto:

Mrs. Mary A. Clements, who is a party to the action and witness in her own behalf as contestant.

Mrs. Emma Burns, on the same grounds.

Joseph McGinn, on the same grounds.

James E. McGinn, on the same grounds.

Thomas McGinn, on the same grounds.

Mrs. Johanna McGinn, on the same grounds.

Patrick H. McGinn, on the same grounds.

5. The charges in the bill of costs for the services of experts B. M. Gunn and Doctors Stallard, Mays and H. C. Bowie are disallowed for reasons heretofore stated, that the court has no power under the statute to allow other than ordinary witness fees.

6. The charge for serving subpoenas is disallowed.

7. The charges for taking depositions before Notary Harris are disallowed for the reasons recited in respondent's objections.

8. The charge for services rendered as attorney and counsel for contestants in the contest of the alleged will of decedent is disallowed for reasons already stated by the court.

9. The costs as retaxed are a proper charge against the parties respondent, and the estate is not liable therefor, and the court orders the bill of costs heretofore filed to be retaxed as hereinabove determined.

Exceptions to each and every of the foregoing rulings reserved and noted for the respective parties to the action and proceeding and motion.

ESTATE OF BERTHA BERTON, DECEASED.

[No. 7245; decided March 19, 1892.]

Wills.—Every Portion of a Will must be Made to have Its Just Operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.

Wills.—Transposition of Paragraphs.—Words or clauses of sentences, or even whole paragraphs, of a will may be transposed to any extent, with a view to show the intention of the testator.

Wills.—If an Immediate Distribution of the Estate after due administration had in this case been contemplated, the testatrix would not have made the expense of educating the children a charge upon the estate.

Wills.—The Intent of the Testatrix in this Case was, that the estate be kept whole until the children attain their majority, and the bequest to the husband is dependent upon his living until that time, and was in a measure intended as compensation for the services expected of him by the testatrix in the promotion of the welfare and the education of the children.

Distribution.—Premature Application for.—The application of the husband in this case for distribution, having been filed before the children attained their majority, is premature and must be denied.

Bertha Berton died on April 3, 1888. The will set forth in the opinion was admitted to probate and the surviving husband appointed executor thereof on May 10, 1888. He filed a petition for distribution on October 17, 1891, and objections thereto were thereafter filed by the guardian of the children.

Sidney V. Smith, for petitioner.

Naphtaly, Freidenrich & Ackerman, for guardian of the children.

COFFEY, J. Flavien Berton was the surviving husband of decedent testatrix (her second spouse) and the executor of her will and a legatee and devisee therein. The will is in the following form, it being premised that the instrument is olographic, and that from the evidence it appears that it was written by a French woman, as may appear from the idiomatic expression:

"IN THE NAME OF GOD, AMEN.

"I, Bertha Berton, of the City and County of San Francisco, State of California, being of sound mind and memory, calling to mind the frealty of human life, desire to settle my worldly affairs and direct how the estate of which it has pleased God to bless me shall be disposed, at the time of my decease.

"I do make and publish this my last will and testament, hereby revoking all other wills and testaments by me made heretofore.

"I comend my body to the earth, to be buried with little expense by my executors hereafter named.

"My will is, that all my debts and funeral expenses be paid out of my estate by my executors.

"I desire to give to my only two beloved children, Michael Albert Tschurr, born in San Francisco, and now residing with my beloved father, Michael Corai, in Zug-Graubenden, Switzerland, and my daughter, Anna Paulina Catharina Tschurr, born and now residing in San Francisco, the summe of ten thousand dollars each, share and share alike; this to be theyr separate part of my estate, which I give to them.

"I further give and bequeath the balance of my estate, of which I may die seised or possessed, or to which I shall be entitled at the time of my decease, to my beloved husband, Flavien Berton, of the City and County of San Francisco, my beloved son, Michael Albert Tschurr, and my beloved daughter, Anna Paulina Catharina Tschurr, share and share alike. Each to receive one-third of my estate after my two named children will have received theyr ten thousand dollars each.

"My beloved son shall receive his share of my estate at the time he attains the age of twenty-five years. It is my wish that my only daughter should not marry before she attains the age of twenty years. At that time, if she maries, she to receive all her part of my estate, this to be forever her own separate property outside of five thousand dollars, which shall be her mother's wedding gift. Her husband never to have any right to the ballance of her estate, but the interests, her estate to be and remain her *own separate*

property, at the time of her decease to go to her children, or if there are no children, one-half to be given to her husband, the other half to her brother or his *hevers*.

"Should it please God to call one of my children from this earth before they should be *maried*, or have family, *theyr* share to go share and share *alike* to *theyr* step-father, or brother or sister.

"It is my will, that my children above named, being the children of my dearly beloved husband, Christian Tschurr, deceased, be well educated, *theyr* education be paid out of the interests of my estate. My son to *choos* the proffession he wishes, or has talent for.

"I do nominate, constitute and *apoint* my beloved husband, Flavien Berton, of the City and County of San Francisco, to be the executor of this my last will and testament. I have full confidence that he will do all in his power to promote the wellfare of my two named children, and in this *confidence* he shall not be obliged to give any bonds whatever. He shall have full power to sell at public or private sale, at such time as he may deem best, all the property, real or *personall*, of which I may die *seised* or *posessed*, and to which I may be entitled at the time of my decease.

"Should my dear husband, Flavien Berton, be called from this earth before my children attain *theyr* majority, his share of my estate to go back to my said two children. Should he *remary*, he to have only *fife thousand* dollars of my estate, the ballance to go back to my two children, share and share *alike*. My beloved husband's father, Jean Berton, residing at St. Sorlin Drom, France, I wish in case of our *decase* to get one hundred dollars *yearly* for the time of his life, this contribution to be paid out of the interests of my estate and to cease at the time of his *decase*.

"I, the said Bertha Berton, has to this my last will and testament set my hand and seal this the eighteenth day of April, in the year of our Lord One thousand eight hundred and eighty-seven.

"(Seal)

BERTHA BERTON."

Testatrix was the mother of two children, the issue of her marriage with her first husband, from whom she inherited

the estate that she disposed of by will. She married the applicant, Mr. Berton, about a year before her death. In the will above quoted it appears that after giving to each of her children \$10,000 she undertakes to distribute the residue as follows: "I give the balance of my estate to my beloved husband, Flavien, and my beloved children—share and share alike; each to receive one-third"; the estate to be distributed at the time which she then undertakes to fix, the son to receive his share when he attains his twenty-fifth year, the daughter her share upon her marriage, or, if she die without issue, this share to go to her brother; and, having stated the conditions upon which these two residuary legatees shall obtain their one-third of the estate, she limits the legacy given to Berton, by providing that should he die before her two children attain their majority, the share bequeathed to him shall go back to her children.

It is agreed by all the counsel that the postponement of the son's interest, there being no intermediate estate and no trust created to support it, is inimical to the absolute nature of the devise, and must be disregarded as void. So, likewise, the limitation over of the daughter's share after her decease to her children may be overlooked, the estate being all personalty.

It is claimed by counsel opposing the application that, as the evidence before the court shows that these children are not of age, Berton's application is premature, and he must wait until these children reach their majority before he can claim distribution of the estate.

The court should ascertain and execute the intention of the testatrix.

Redfield in his work on Wills says (volume 1, pages 430-432): "There is, perhaps, no rule of construction of more universal application to wills, or which oftener requires to be acted upon, than that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible." (Page 435, rule 14.)

The next rule of construction laid down by him is rule 15: "There is no more clearly established rule of construction, as

applicable to wills, than that words or clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator." Where a construction of a will "gives effect to all the provisions of the will, and renders them all harmonious and consistent, both with each other and with the general purpose and intent of the will, it affords very satisfactory ground of presumption that it reaches the source of the difficulty, and explains the mode in which it arose."

In the light of these rules of construction, what was the intention of Mrs. Berton as expressed in her will with reference to the bequest made to her husband? With much particularity, and with the love of a mother for her children, she fixes the time when they are to enjoy the estate bequeathed to them at a period when they are presumed to know the value of money. Her son is to have his share when he is twenty-five years of age—her daughter when she marries; and, feeling that her children are entitled to this estate, made for them by her labor, and not that of their stepfather, who, though kindly spoken of by Mrs. Berton in her will, is nevertheless a stranger to them, she declares that he is entitled to his share after they have become of age or married. In giving her husband one-third of her estate, but making the gift dependent upon his living after said children attain their majority and marry, she was influenced thereto by the belief that her second husband deserved and should be compensated for his labor expended and interest taken in the welfare and education of said children. By the terms of her will she refers to the services expected of him in behalf of these children in these words: "I have full confidence that he (Berton) will do all in his power to promote the welfare of my two named children"—and beyond all that, and as indicative of the full and matured intent of the testatrix to keep her estate intact and undisturbed during the minority of said children, she charges said estate with the expense of educating them, in these words: "It is my will that my children above named, being the children of my dearly beloved husband, Christian Tschurr, deceased, be well educated, their education be paid out of the interest of my estate." If an imme-

diate distribution of the estate (after due administration) had been contemplated by the testatrix, she would surely have imposed no such charge upon the estate. Can it not fairly be maintained that the import of this language is that the money of the estate should be so invested as to yield an income, and such income or interest be applied, so far as necessary, toward the education of said children, who were, at the time of the execution of said will, and still are, being educated abroad?

The court adopts the argument, to the extent hereinabove indicated, against the application, and believes that the intent of the testatrix is carried out in the keeping of the estate whole until the minor children attain their majority.

The petition for distribution is denied.

In Construing a Will, Effect Should be Given, if possible, to every object and every expression therein contained. It is a fundamental rule that the words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative: *Webster v. Thorndyke*, 11 Wash. 390, 39 Pac. 677; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Estate of Mayhew*, 4 Cal. App. 165, 87 Pac. 417; *Estate of Stratton*, 112 Cal. 513, 44 Pac. 1028; *Estate of Tompkins*, 132 Cal. 173, 64 Pac. 268.

A Court cannot Reform a Will after the death of the testator; nor can it transpose words or provisions therein, so as to change the import and meaning, when the intention of the testator can be discovered from an examination of the instrument as it is written. However, courts, in reading a will, do not hesitate to transpose words, supply omitted ones, and reject those that are repugnant, when necessary to do so in order to give effect to the evident meaning and purpose of the testator: 1 *Ross on Probate Law and Practice*, 73.

ESTATE OF JOHN LEVINSON, DECEASED.

[No. 9438; decided May 2, 1891.]

Inventory.—What must be Included in.—An executor must return in the inventory everything of value belonging to the estate of his testator, whether it is property owned by or a debt due the estate.

Inventory.—The Goodwill of a Business is Property, so is a Trade-mark; and where the decedent was a member of a partnership, the goodwill of the business and a trademark owned by it should be embraced in the schedule of assets in the inventory, unless there is a clear provision in the articles of partnership excluding the estate of a deceased partner from a share in the value thereof.

Contracts.—Particular Clauses of a Contract are Subordinate to Its General Intent, and the whole of a contract should be taken together so as to give effect to every part if reasonably practicable, each clause aiding in the interpretation of the other.

Inventory.—Assets of a Firm Include the Goodwill of the business and trademarks owned by the firm.

Inventory.—Doubtful Assets.—Even if the Question is in Doubt and equally balanced, whether an estate is or is not to be deprived of a share of the goodwill of a business trademark, it must be included in the inventory.

Horace W. Philbrook, for heirs of decedent.

Jarboe & Harrison, for S. W. Raveley, executor.

Reinstein & Eisner, for surviving partners.

COFFEY, J. Mrs. Fanny Levinson, the mother, and Miss Julia Levinson and Miss Ida Levinson, sisters of the above-named decedent, all being legatees in the will of said decedent, have presented a petition asking that the executor of said will be required to make and return to the court a true inventory and appraisement, and also that he require an account from Wm. J. Newman and Benjamin Newman, surviving partners of the firm of Newman & Levinson, of which firm said decedent was one of the founders and a member up to the time of his death.

The executor has demurred to said petition, contending that it does not state facts sufficient to entitle the petitioners to relief. The said surviving partners have also filed a demurrer to said petition upon the same ground.

The matter before the court is the issue of law arising upon these demurrers.

The question to be determined is whether the estate of said decedent has any interest in the goodwill of and in the trademark belonging to the partnership of Newman & Levinson up to the time of the death of the decedent, John Levinson; whether the said goodwill and trademark respectively must be valued in determining what is due to said estate from said partnership, or from the said surviving partners. This question is to be determined by a consideration of the provisions of the articles of partnership of said firm, set forth as Exhibit "C" in the petition, and particularly of that clause of said articles designated as "XII," pages 22-24 of said petition, in connection with the averments of said petition.

In the inventory and appraisement returned by the executor to the court the interest of the estate is thus set forth: "The interest of the deceased in the partnership of Newman & Levinson, of which the deceased was a member at the time of his death, the business of said partnership being carried on at Nos. 129-131 Kearney street, San Francisco, appraised at \$20,790.80."

It is set forth in the petition that before returning this inventory the executor was by the petitioners requested to cause the inventory and appraisement to show in detail what was meant by "the interest of the deceased in the partnership of Newman & Levinson," therein mentioned, and that the executor refused to comply with said request. It is also set forth in said petition that no share of the value of the goodwill of the business of said partnership or of the trademark mentioned in the petition is included in said inventory.

I should have decided this matter from the bench at the conclusion of the oral argument, December 10, 1890, but from respect to the desire of counsel to supplement their views by briefs. The delay in announcing the decision of the court is due to the labor imposed by examining the elaborate expositions of counsel and consulting the numerous authorities by them cited. While the discharge of this duty involved labor, it was also interesting and instructive, and it is to be hoped that the result will be satisfactory to the prevailing party.

It is insisted upon the part of the demurrants that by the articles of copartnership the surviving partners became debtors of the estate, and that the only relation here being that the debtor and creditor, the representatives of the deceased partner have no further connection with the concern except as creditors; and that, upon the principles laid down in all the authorities, the demurrant executor has returned a complete and perfect inventory, the omission of the goodwill and trademark being necessary under the terms of the articles of copartnership, which vested in the surviving partners such items to be accounted for to the estate as a debt, but not as an available asset to be inserted in the inventory.

It is claimed by the demurrants that Article XII of the copartnership agreement transfers in terms or by necessary implication the goodwill of the firm, and that the articles of copartnership should be the guide for the court, and that where they do not violate the statute such articles may take its place.

It is immaterial, with regard to the subject matter of this controversy, whether the relation of the estate to the partnership is that of owner of an interest therein or that of creditor. Even if only a creditor, it is still the duty of the executor to return a correct statement of the debt due the estate from the partnership.

The legal proposition here is simply this: If it be a thing of value it must be returned in the inventory. This is the law of this state, binding upon the executor. It is scarcely necessary to cite the sections of the codes defining the executor's duty in this regard, so well is it understood, nor is it requisite in this connection to repeat references to the sections fastening the quality of property upon goodwill and trademark. It is settled that these things are property, and should be embraced in the schedule of assets in the inventory and appraisal, unless there be an express agreement for their exclusion.

To exclude the estate from a share in the value of the goodwill and trademark of the partnership, there should be a clear provision to that effect in the articles of agreement.

Article XII of the agreement of copartnership, upon the construction of which it is claimed the decision of this controversy must depend, is as follows:

"XII.

"In the event of the death of one of the copartners the inventory provided for herein shall be taken as expeditiously as possible, and without unnecessary delay; the surviving partners, if requested so to do, shall admit to the place of business of the firm at least one person, selected, designated and empowered by the heirs or legal representatives of the deceased partner to represent the interest of his estate in the copartnership; such person, so representing the interest of the estate of the deceased partner, shall have accorded to him access to all the books, papers and accounts of the firm, and may, at his election, remain and continue at the place of business thereof until all matters relating to the interest of the deceased partner and his estate shall have been fairly and satisfactorily arranged, and settled and adjusted, and the total amount due to the estate of the deceased partner shall have been ascertained and determined.

"The total amount ascertained and determined to be due the estate of the deceased partner, on account of his interest in the copartnership, shall be paid to the heirs or the legal representatives of the deceased partner, in twelve successive and equal monthly installments, commencing within one month from the time the amount so due has been ascertained and determined; for the amount of which installments the surviving partners shall execute and deliver to such heirs or legal representatives their promissory notes, payable as aforesaid, without interest, and satisfactorily secured by indorsement or otherwise; provided, however, that the surviving partners shall have the option to continue the said copartnership, the estate of the deceased partner taking the place of the decedent, on such terms and conditions as may be agreed upon between the surviving partners and the legal representatives of the deceased partner, but it shall not be obligatory upon the surviving partners so to do. The surviving partners and their successors shall also have the right and privilege of con-

tinuing the said business under the said designation and name of Newman & Levinson."

Before dealing with this article specifically, it may be well first to consider the general scheme and scope of the agreement with regard to the right of a partner in the property of a partnership after dissolution, inasmuch as, according to the code, particular clauses of a contract are subordinate to its general intent, and the whole of a contract should be taken together so as to give effect to every part, if reasonably practicable, each clause aiding in the interpretation of the other.

Of course, as counsel for demurrants observes, the provisions of our statutes as found in the codes are simply declaratory of the law as it existed always; they do not change in any respect the law as it was adjudicated before their enactment, and, consequently, cases arising under the law as it stood anterior to the code may be appositely cited.

In the copartnership contract three distinct provisions may be noted:

1. A provision regulating the manner in which the partnership property shall be disposed of and divided among the partners, in case they shall be all living at the expiration of the term agreed upon for the continuance of the partnership, and the partnership be not renewed (Article XIII):

"XIII.

"At the time of the expiration of said partnership, under the terms hereof, if no new articles of copartnership have been agreed upon nor the present ones continued in force, and the copartnership renewed in the manner hereinafter provided for, the inventory shall be taken and appraisement made substantially in the manner hereinbefore provided in the case of the yearly inventory; thereupon the assets shall be turned into cash, if necessary, and the total amount of all the debts and liabilities due or owing by the copartnership to third persons shall be paid; next in order, the surplus capital, if any, standing to the credit of any partner, with any interest due thereon, as hereinbefore provided for, shall forthwith be paid to the partner entitled thereto; to meet such payment recourse must be had to all the cash of the copartnership remaining on hand or in bank, to the stock of merchandise on

hand, and, finally, to all outstanding accounts, claims and demands of the copartnership, whether represented by book accounts, promissory notes, judgments, or otherwise; then the interest, as hereinbefore provided for, upon the capital contributed by the copartners, if any be due to them, or any of them, shall be paid; and after all the debts and liabilities, surplus capital and interest shall have been paid to the parties entitled thereto, the residue of the assets of the copartnership, including cash on hand or in bank, store and office fixtures, merchandise, outstanding accounts, and all claims and demands, of whatsoever kind or nature, due or owing to the copartnership, shall be sold to the partner who will make the highest and best bid therefor, and the proceeds realized from such sale shall be applied in the first instance to the repayment to each of the copartners of the respective portions of the capital originally contributed by each to the copartnership, and if such proceeds are not sufficient to pay to each partner the full sum originally contributed by him to the capital of the copartnership, such proceeds shall be ratably divided among said copartners according to the amount of original capital contributed by each to the copartnership; that is to say, each partner shall receive such a percentage of the proceeds as his proportion of the original capital bears to the aggregate capital originally contributed to the copartnership by all the members thereof; but if such proceeds exceed in amount the aggregate original capital of the copartnership, the excess over and above such aggregate capital shall be considered as net profits, and shall be divided in the proportions hereinbefore provided for in case of profits—that is to say, the said William J. Newman shall receive seventy-five per cent of such excess; said John Levinson twenty per cent, and said Benjamin Newman five per cent.”

2. A provision as to what a partner shall be limited to in case he breaks the partnership contract—disrupts the partnership—before the expiration of the term agreed upon (Article XIV):

“XIV.

“Should any partner desire to withdraw from the copartnership before the expiration of said term of three years from said fifth day of July, 1888, he shall have the privilege

of doing so after having given at least six (6) months notice, in writing, to each of his copartners of his desire and intention to withdraw from the firm, and at the expiration of said six months his connection with the firm as a partner shall cease and terminate.

“Should a dissolution of the copartnership take place within six months after the date of this written agreement and declaration, by reason of any cause, matter or thing whatsoever, the partner retiring or withdrawing or causing the dissolution shall be deemed to have forfeited all his rights to any share of the profits that have been, or might be, realized by the firm from said fifth day of July, 1888, up to the date of such dissolution, and shall be entitled only to a repayment of his original contribution to the capital of the firm and any surplus capital actually paid in by him (exclusive of surplus capital arising from profits left in the business), together with interest on such original and surplus capital at the rate of seven (7) per cent per annum, as hereinbefore provided for; such repayment to be made in six (6) successive monthly installments, evidenced by promissory notes or otherwise, as may be agreed upon.

“Should a dissolution of the copartnership take place within two years from said fifth day of July, 1888, by reason of any cause, matter or thing whatsoever, the partner retiring or withdrawing or causing the dissolution shall be entitled to his share of the net profits realized during the existence of the copartnership, but in all other respects the same course shall be pursued as in this section already provided.

“In the event of the sudden demise of one of the copartners who has any surplus capital in the business, such demise shall constitute the necessary notice to the remaining partners, and the legal representatives of said deceased shall, if they require and demand it, be entitled to receive the full amount of such surplus capital within three (3) months after such demise.”

3. A provision allowing the surviving partners, upon the death of a copartner, to purchase his share in the partnership and to succeed to the business. (See Article XII, *supra*.)

These three provisions form, as is contended by counsel for applicant, an intelligible, consistent, reasonable and just

scheme or plan; and in attempting to develop the scope of that plan this court conceives it can do no better than to adopt the views verbatim of counsel for petitioners.

What is that scheme or plan?

First—At the expiration of the term, if all the partners are alive and do not renew the partnership, the “assets shall be turned into cash, if necessary,” and certain sums shall then be paid the respective partners. Then “the residue of the assets of the partnership . . . shall be sold to the partner who will make the highest and best bid therefor,” and the proceeds shall then be divided among all the partners. Now, the terms “assets” and “residue of the assets” include the goodwill and trademarks.

Counsel for the surviving partners denies that these words “residue of the assets” include goodwill because of the next following words, “including cash on hand or in bank, store and office fixtures, merchandise, outstanding accounts, and all claims and demands,” etc. But counsel is clearly wrong in this, for his contention requires the insertion of the word “only” or “exclusively,” or an equivalent, after “including,” or the change of “including” to “consisting of,” so as to make the passage read “the residue of the assets, including (only) or (exclusively),” or so as to substitute “consisting of” in place of “including.” But the word “including” does not mean “including only,” or “including exclusively,” or “consisting of,” and there is no warrant for making any such change as the counsel wishes. And, besides, the “assets” mentioned which “shall be turned into cash if necessary” are not followed by even such a word as “including.” *All the assets* must be sold and the proceeds divided. *All the assets* include the goodwill and trademark. And the provision clearly is that in case all the partners live till the end of the term of the partnership agreed upon, and do not renew the partnership, all of them shall share in the value of the goodwill and trademark.

This provision is obviously reasonable and just.

Second—It is provided (Article XIV, *supra*) that if any partner shall break the partnership contract—shall break up, by withdrawal or otherwise, the partnership—before the expiration of the term agreed upon, he shall forfeit something—

more if within the first six months, less if after six months and within the first two years.

For this, too, there is an obvious reason, the purpose being to deter each copartner from breaking the contract of partnership.

Third—We come finally to Article XII, upon the language of which the decision of the controversy is to turn.

We find here the provision that upon the death of one of the copartners "the inventory provided for herein shall be taken." Whether the inventory referred to here is the same as the annual inventory mentioned in Article VII on which profits are computed, or a special undescribed inventory, is not perfectly clear, for in Article XIII we find it provided that an "inventory shall be taken and appraisement made substantially in the manner hereinbefore provided in the case of the yearly inventory," language quite different from "the inventory provided for herein" in Article XII. But it is scarcely material whether the words "the inventory provided for herein" mean an inventory made like the annual inventory provided for in Article VII or not, for in Article XIII the inventory provided for is expressly directed to be made up substantially like the annual inventory; and Article XIII does provide that the value of the goodwill and trademark shall, at the end of the term, be divided among all the partners, if then living. It is therefore clear that even if the words "inventory provided for herein" in Article XII mean an inventory made up substantially as described in Article VII, this would not be at all inconsistent with the idea that the value of the goodwill and trademark is to be divided. But while it is scarcely material to consider what is meant by the words "inventory provided for herein" in Article XII, it is worth mentioning that there seem to be three species of inventory provided for in these articles of partnership, viz.: (1) In Article VII an inventory made up in a manner there specified and for the purpose of computing annual profits; and for that purpose it would be clearly useless to put the value of the goodwill or trademark into the inventory (*Steuart v. Gladstone*, *Wade v. Jenkins*); (2) In Article XIII an "inventory . . . made substantially in the manner" described in Article VII; and (3) in Article XII an "inventory pro-

vided for herein," that is, provided for in Article XII—an inventory made up not in any specified way, but in such reasonable manner as to subserve its purpose.

Next, we notice that the representative of the estate of the deceased partner is entitled to be present until "the total amount due to the estate of the deceased partner shall have been ascertained and determined." This indicates that the surviving partners are not expected to be the sole judges of what the interest of the estate in the partnership shall be, for, if so, of what benefit would it be to the representative of the deceased to supervise their proceedings? And even if the articles of partnership did provide for the surviving partners to be the sole judges in the matter, such provision would be void. For, on the contrary, it is for a court of justice to decide what is the "total amount due to the estate": See 12 Am. & Eng. Ency. of Law, p. 305, and n. 1.

Finally—"The total amount ascertained and determined to be due the estate of the deceased partner on account of his interest in the partnership shall be paid" to the estate, and thereupon the surviving partners shall succeed to the property of the partnership, and "shall have the right and privilege of continuing the said business under the said designation and name of Newman & Levinson."

There is nothing here like the provision in *Steuart v. Gladstone*, L. R. 10, Ch. D. 626, that the estate is to receive only "the sum which shall appear at the credit" of the deceased partner upon the books or upon any inventory, even if the inventory to be taken is to be made up like the annual inventory mentioned in Article VII. For, even if the inventory to be taken were to be made up like the annual inventory mentioned in Article VII for arriving at the profits, and without setting down the goodwill and trademark therein—even such an inventory would answer every purpose in ascertaining the "total amount due to the estate"; for, in any event, the goodwill and trademark would have to be taken into consideration and valued separately. And, further, while there is no provision limiting the interest of the estate to the "sum which shall appear at the credit" of the deceased partner upon any inventory, the amount to be paid to the estate shall be, without any limitation, "the total amount ascertained and

determined to be due the estate of the deceased partner on account of his interest in the partnership"; and this shall be after "all matters relating to the interest of the deceased partner and his estate shall have been fairly and satisfactorily arranged, and settled, and adjusted."

The substance of Article XII clearly is, as was the case in *Hall v. Barrows* and other cases cited by counsel for applicant, that the surviving partners have the privilege of buying out the interest of the decedent at its actual value.

Reynolds v. Bullock, 47 L. J. Ch. 773 (decided in 1878 by the chancery division of the high court of justice), is a most valuable decision, rendered after a full and able argument. The partnership was dissolved by expiration of the term agreed upon, and by the twenty-sixth and twenty-eighth clauses of the partnership deed the defendant was entitled to succeed to the partnership business and property, being bound to pay the plaintiff the value of his share in the "property and effects" of the partnership. The plaintiff sued for his share in the value of the goodwill. The decision is so pertinent to the case at bar that it may be well to quote. The court said:

"It appears to me that the goodwill ought to be valued for the present purpose. It is a question of the contract of the parties, arising upon the twenty-sixth and twenty-eighth clauses of the deed of partnership; in other words, it is a question whether goodwill comes under the words 'property and effects.' It was settled by *Hall v. Barrows*, 32 L. J. Rep. Ch. 538, etc., that it is part of the property and assets of a firm. The fact in the present case, that the business was the defendant's when the partnership began, seems to me material; the goodwill of the business at the end of the partnership is a new and different thing from that which existed before. As to the other cases mentioned, I think that *Burfield v. Rouch*, 31 Beav. 241, and *Hall v. Hall*, 20 Beav. 139, are not authorities on this question. *Austin v. Boys*, 24 Beav. 598, etc., cited in Mr. Justice Lindley's book, was a case of a special kind, which depended very much upon the terms of the particular contract, and affords no assistance for the present case. The view of Sir William Grant in *Kennedy v. Lee*, 3 Mer. 441, like other early cases

in reference to goodwill, is really inapplicable to the present law on the subject. I quite agree with the observations as to the desirableness of making such things as these plain in the contract; if this had been done the present question would not have arisen, but I think that a particular provision was required, expressly negating the view that the goodwill was to be deemed part of the business, and stipulating that it should, at the expiration of the term, belong to the defendant solely. It is perhaps unlikely that the plaintiff would have accepted such terms; at all events, no such terms were made, and therefore the goodwill must now be dealt with as part of the property."

I consider the case of *Hall v. Barrows*, 3 N. R. 259, as the most appropriate of all the cases cited to the matter here in controversy. That was an action by the executors of Hall against his surviving copartners for a share in the value of the goodwill of the business and of the trademarks of the former firm. By the partnership articles the estate was entitled to receive from the surviving partners the value of the share in the estate in the partnership property, the surviving partner having the right to take the same at a valuation and to succeed to the business. Lord Chancellor Westbury held that the goodwill of the business ought to be taken into account in the valuation; and, also, that the exclusive right to use the trademark was part of the property of the partnership and ought to be included in the valuation. While this case is not among those cited or adverted to by counsel for demurrants, the argument for surviving partner is singularly similar in both cases and upon a state of facts quite analogous.

(See argument on page 260 and remarks of lord chancellor on page 263, 3 N. R.)

Even if the question were in doubt and evenly balanced, whether the estate is or is not to be deprived of a share of the goodwill and trademark, then the decision must be in favor of the estate.

It is clear, however, to the mind of the court that upon the death of one of the partners he is not to suffer thereby any forfeiture of his property, but his estate is to receive his full and fair share in all the property assets of the partner-

ship, not in any wise forfeiting the decedent's share in that part of the partnership property—more valuable than all the rest—the goodwill of the business and the trademark. And this conclusion makes the partnership contract intelligible, reasonable, consistent and just.

It follows from the foregoing that the demurrer should be and it is overruled.

ESTATE OF THOMAS H. BLYTHE, DECEASED.

[No. 2401; decided November 29, 1890.]

Minor and Absent Heirs—Appointment of Attorney by the Court.—The court is authorized, in its discretion, under Code of Civil Procedure, section 1718, to appoint a competent attorney to represent minor heirs having no general guardian in the county; heirs and creditors who are nonresidents of the state, and other interested parties who are unrepresented. The exercise of this power imports no censure upon the counsel for the administrator; it is assistive and not obstructive.

Minor and Absent Heirs—Compensation of Attorney.—There is no absolute standard by which to fix the compensation of an attorney appointed by the court to represent minor or absent heirs. A small estate may entail greater labor and relatively larger responsibility than an estate of magnitude. The size of the estate is a factor but not the prime one in the question. Each case must therefore depend upon its own circumstances.

E. R. Taylor, for the application.

Wm. H. H. Hart, John H. Boalt and Thomas I. Bergin, for Florence Blythe, contra.

COFFEY, J. This is an application for compensation by Dr. Edward R. Taylor, an attorney and counselor of this court, for legal services rendered under and by virtue of an order of appointment made and entered on the thirty-first day of December, 1885.

Applicant accompanies his petition with a schedule of the services for which he claims compensation. This schedule includes the services in and about the trial of the contest of heirship in the matter entitled "Florence Blythe versus Abbie Ayres and others."

For the purpose of this decision, and without prejudice, the court declines to consider and discards so much of the said schedule as embraces the trial of said action or contest of heirship.

Apart from these items, comprehending the trial of the action from and including July 15, 1889, to and including June 27, 1890, the court is clearly of opinion that the petition is meritorious.

The petitioner has been active and diligent under said appointment, and has been of great service to the said estate in the matter of the conservation of its assets, and has also been of service to the court in enabling it to reach correct conclusions in many difficult matters coming before it during the administration of said estate. A very considerable part of said services has been rendered under the eye of the court, and some of them by its specific direction.

The appointment was conferred of the court's own motion, and without the petitioner's precognition or through any solicitation or suggestion, but by reason of the necessities of the situation, of the peculiar position of the estate, and of the eminent fitness of the petitioner for the trust.

The reasons which prompted the court to make the appointment in the first instance have been justified by the results to the estate.

The authority for the action of the court is found in the statute, section 1718, Code of Civil Procedure, and I am of opinion that the necessity for the continuation of the appointment lasted until the determination of the question of heirship—that is, as to matters of probate administration—but not longer.

The objections to the application are all and severally overruled, and an exception noted in behalf of objectors.

I have no doubt of the power of the court in the premises. As to the prudence with which it has been exercised in the particular case, there can be no question when we consider the resultant advantage to the estate of the labors of the appointed attorney; and this may be intimated with due credit to the administrator and his employed counsel.

One or two instances suffice to show that, notwithstanding the fact that the administrator was represented by counsel of approved ability, the estate was benefited by the efforts of the petitioner. In the case of the so-called "Mexican Assets" a strenuous endeavor was made to obtain large appropriations, in addition to those already made, for the purpose of carrying on a scheme begun in the lifetime of decedent, which endeavor was sturdily and successfully resisted by the appointee of the court. The good faith of the administrator and his counsel was not questioned, but the propriety, policy and legality of continuing the adventure begun by the decedent was stoutly opposed by the petitioner, and his view finally prevailed.

The court does not hesitate to declare that the present prosperous condition of the property of the estate was largely due to the result of that contention, in which the petitioner labored almost unaided, and in which the counsel now opposing his application lent no assistance, but to which, as the court understood, and still understands, he was adverse, as were almost all of the counsel for the so-called "collateral" claimants.

In the matter of the application of the administrator to participate in the contest as to heirship, under section 1664, Code of Civil Procedure, which application was urged from a sense of duty and obligation by the counsel for the late administrator, the appointee of the court maintained successfully the proposition that the administrator had no interest in the litigation which demanded or justified his participation therein, and the court so held, and was sustained by the tribunal of review, the petitioner herein acting in these proceedings by special direction of this court.

These are two notable instances of the prudence with which the court acted in pursuance of the power conferred by section 1718, Code of Civil Procedure.

It may be seen from these two cases, and from many other instances, that the labors of the appointed attorney were of service to the estate and necessarily to the client of counsel now objecting to his petition for compensation.

His appointment was not antagonistic to the employment by the administrator of counsel, nor intended to interfere therewith, nor to harass, obstruct or embarrass that counsel, but directly in conformity with the provision of the Code of Civil Procedure which conferred a discretionary power upon this court.

The exercise of this power imports no censure upon the counsel for the administrator. It is rather to his advantage than detriment. It is assistive and not obstructive. It is idle to say he stands in no need of assistance. The law has declared that the court may, in its discretion, appoint a competent attorney at law to represent certain classes of persons, such as are embraced within the order of appointment herein. But the court does not infer, from the opposition here made, that it proceeds from the administrator. He has no cause of quarrel with the act of appointment, nor can anyone else assume such a cause for him.

The principle upon which this petition stands was determined in this court in this estate January 6, 1885, and the court perceives no change in the circumstances to authorize an abandonment of the position then taken.

With respect to the amount of allowance, it is more difficult to decide. Opinions differ so widely that it is rare to find an award of the court satisfactory to any, much less to all parties, and seldom can the court feel entirely assured that it has fixed a fee that is exactly equivalent to the service rendered. It is, perhaps, the least welcome of the incidental duties of the court, to gauge the value of the services of counsel.

There is no absolute standard, and each case must depend upon the uncertain measure applied by the court, which is apt to err either way in its estimate.

One counsel says a large estate must pay a large fee. Not so, necessarily. A small estate may entail greater labor and relatively larger responsibility than an estate of magnitude. The size of the estate is a factor, but not the prime factor, in the question.

An estate of comparatively small value may be more complex in character than one of much greater pecuniary importance.

The value and character of the estate are essential elements in considering the amount of counsel's compensation.

In the case here the estate is of unusual magnitude, appraised at several millions of dollars; diversified in quality (although much simplified since the removal of several excrescences that originally menaced its solvency), and has given rise to many important and delicate, if not novel, questions, the intelligent discussion and correct determination of which were of vital consequence to the inheritance.

In these discussions the assistance of the appointed attorney was of great advantage to the estate, especially so where he differed from the attorney for the administrator, and where the court had the right to be aided by counsel of its own selection under the statute.

Of course the principal share of the burden of labor and responsibility throughout the administration was borne by the administrator's attorney, and the fact that in many important matters the appointed counsel for the heirs differed from him, and that the court agreed with the latter, by no means detracts from the just claims of the former.

The period covered by the schedule annexed to the petition here is about five years, and comprehends a great variety of matters coming strictly within the probate administration of the estate, and many other matters attended to by the court's own order, in the interest of the estate.

For all of these services the petitioner is entitled to a reasonable compensation to be paid out of the estate. He has already received by order of the court the sum of \$7,500 on account. A further sum of \$7,500 is, in my judgment, a fair allowance, and such amount is allowed and ordered to be paid.

ESTATE OF EDWARD FORD, DECEASED.

[No. 4234; decided March 20, 1890.]

Account of Administrator—Estoppel to Assert Trust Character of Property.—An administrator who accounts for money as the property of the estate of his intestate cannot afterward be heard to say that it was held by another in trust for certain of the heirs, and that he collected it under a power of attorney for them.

Trust in Realty—Whether may Rest in Parol.—An express trust in realty can be created only by a writing containing language appropriate for that purpose.

Louis G. Starke was appointed administrator of the above-named estate on July 1, 1885. On September 10, 1886, his letters were revoked, and E. J. Le Breton was appointed administrator. The account mentioned in the opinion was filed by the former administrator on January 4, 1887, and was settled on February 15, 1887. The power of attorney referred to in the opinion was executed on February 12, 1885, and the application here decided was made by the former administrator on behalf of the heirs represented by him under this power of attorney.

Edward P. Cole, for Louis G. Starke, former administrator, and for heirs represented by him.

Horace G. Platt, for E. J. Le Breton, administrator.

COFFEY, J. This is practically a motion of the late administrator to disclaim what he has done as an administrator, and yet hold, under a power of attorney, what money he has collected by virtue of such administratorship. His final account, as settled by this court, shows that he has collected for this estate the following:

| | |
|---------------------------------|---------|
| Cash from W. H. Hart..... | \$800 |
| Cash from Jno. H. Wise..... | 700 |
| Suit of Starke v. McDevitt..... | 350 |
| <hr/> | |
| Total..... | \$1,850 |

This account also shows that this administrator had charged against this fund the expenses of this administration, including a large attorney's fee and his own fees.

On February 1, 1886, over a year before the filing of this account, this court made an order authorizing this administrator to compromise a claim of this estate against the estate of Tully R. Wise, deceased. This order was based upon a petition of this administrator, wherein he made the following statement:

"That petitioner claims the property as belonging to the estate of Edward Ford, or the value thereof; that both said Ford and said Tully R. Wise are dead, and there is no writing existing and made between said Ford and said Wise in reference to said property except the deed of conveyance in fee made July 22, 1880. . . .

"That the estate of Tully R. Wise is ready and willing to pay your petitioner the sum of \$750 in satisfaction of his claim to the said land."

It will be noticed that this deed, dated July 22, 1880, now offered in evidence to support the present theory of this administration, viz., that this property, or its value, does not belong to this estate, was known to this administrator when he was claiming that this property, or its value, did belong to this estate. It was the item of \$700, received from John H. Wise, in the final account, that was obtained for this estate by the above-mentioned petition.

If the representatives of the estate of Tully R. Wise claimed this property in trust for Edward Ford's wife and children, it was not necessary to obtain from this court an order allowing them to pay this money over to said administrator, this court had no jurisdiction to make the order, and the receipt of this administrator for said money would have been worthless to these representatives. His receipt as attorney in fact would not go far enough, as he has power of attorney from only a part of the children and none from the wife or son in London.

What proof is there as to the trust? There is no written declaration of trust.

Maurice Casey, formerly a clerk of Tully R. Wise, testifies that Mr. Wise told him that Mr. Ford had told him (Wise) that he wanted to convey to him all his property in trust for his wife and children. He also testified that he drew a

deed and a bill of sale from Ford to Wise, but put in them nothing as to the trust. The bill of sale is not produced. The deed is offered in evidence, but was never put on record.

The only other proof of trust is found in two copies of letters from Tully R. Wise to Edward Ford, son of the deceased, the present executor, in London. This copy of the letter exempts the "McDevitt judgment" and "one lot" from the trust (see letter of July 31, 1881). This lot of land is the only one he really owned (see letter of October 1, 1880).

The final account shows that \$350 was obtained from the McDevitt judgment and \$700 from the Wise estate for this "one lot," or \$1,050 that was not included in this trust.

The rest of the estate is the item of \$800 obtained from W. H. Hart. What proof is there that it was included in the trust? The administrator did not so regard it when he collected it nor when he accounted for it.

So much as to the facts.

There could have been no trust created as to the realty, as it was not reduced to writing, nor was it a resulting trust (Civ. Code, 852, 853). The letter of July 31st disclaims any trust as to the judgment.

If there had been any trust as to the money derived from Hart, there should have been a new trustee appointed when Tully R. Wise died (Civ. Code, 2281, 2287). The administrator had no right to it if it was trust property.

There is no proof before the court establishing this trust. The deed proves nothing by itself. When read in connection with the July letter, it means still less. As a legal document it created no trust. The property thereby conveyed either vested in Wise or remained in Ford. If the desire was thereby to create a trust only, it was a failure. The money by Wise's estate was therefore paid to Ford's estate, to which it belonged.

The Hart and McDevitt items have been sufficiently discussed. The application for an order that this administrator pay over to certain heirs the money collected from this estate and accounted for as belonging to this estate is denied.

ESTATE OF LOUIS GRABER, DECEASED.

[No. 14,399; decided February 15, 1895.]

Inventory—Time for Filing.—The statute prescribing the time within which the inventory and appraisal of an estate of a decedent must be filed is directory merely.

Inventory—Revocation of Letters for Failure to File.—The statutory authority of a court to revoke letters testamentary or of administration, in case the executor or administrator fails to return an inventory within a prescribed time, is discretionary.

Inventory—Time for Filing.—An executor should file an inventory at the earliest moment possible, and if other property subsequently comes to his knowledge, he should file supplemental inventories from time to time; it is, however, the application of the law to a particular state of facts that makes a case, and each case must find its justification or exculpation in these peculiar facts.

Executor.—The Removal of an Executor Requires a Stronger Case than removal of an administrator.

Executor—Removal for Failure to File Inventory.—A court will not remove executors for failure to file an inventory within the precise time prescribed by statute, when their dereliction arises because of the negligence of their counsel.

Ben B. Haskell, for petitioner.

Andros & Frank, for executors.

COFFEY, J. This is a petition for the removal of executors under the provisions of sections 1436, 1437, 1443 and 1450 of the Code of Civil Procedure. The first application is made by Louis Graber, Jr., who alleges that he "is an heir at law of the said Louis Graber, deceased, and a testamentary heir and legatee under the will of said decedent." The ground of his application is that the executors have failed to file an inventory within the time appointed by sections 1443, and 1450, and he insists that, such fact appearing, the court has no discretion in the matter, but must grant his prayer. The supreme court has held in *Phelan v. Smith*, 100 Cal. 169, 34 Pac. 667, that the clause in the code under which the executor or administrator is required to file an inventory and appraisal within three months after his appointment is directory. But the counsel for the applicant insist that Phelan

v. Smith is entirely foreign to the consideration of the subject matter here in dispute, for that was a collateral attack, upon an exception to the introduction in evidence of a probate record, upon the ground, *inter alia*, that the inventory had not been filed within three months. The court held that the failure to file the inventory within three months did not vitiate the proceeding. The rule of statutory construction for which applicant contends requires the concurrence of three premises, none of which exists, he claims, in the case of *Phelan v. Smith*:

1. A grant of power to a public officer to do a certain act involving the interests of the public or of a third person;

2. The existence of the conditions which authorize the exercise of the power granted;

3. The application by the interested party for the exercise of the power granted.

It is a matter of no concern to counsel whether the statute requiring the executor to file an inventory is, as to such executor, permissive, directory or mandatory, but he feels confident that under the circumstances of this case the statute authorizing his removal is mandatory.

Examining the sections in the light of the canons of construction propounded by counsel for executors, according to the context and evident intent of the legislature, the applicant argues as follows:

The legislature first provides that an inventory must be filed within three months. (Section 1443.) It then provides that if the executor fails to do this within the time prescribed, or such further time as the court may allow, not exceeding two months, he may be removed. (Section 1450.) To hold that the court need not discharge the executor, when applied to, is to entirely negative the limitation upon the powers of the court to extend the time for filing the inventory. If this court should now refuse to discharge these executors and should permit them to file an inventory, it will be an extension of time exceeding two months, and a consequent nullification and total disregard of the statutory limitation. If the legislature intended to grant the court discretion to extend the time indefinitely, why was the limitation inserted at all? Why not simply say "such further time as the court

may allow"? Under the construction of the executors the very important words of limitation, "not exceeding two months," are treated as surplusage. For assuredly, if the executors are retained in the face of the application for their discharge, then as executors they must in the future file an inventory; and by their retention the court sanctions and permits their filing an inventory after the expiration of five months, which is precisely the same thing as extending the time.

In this case there is a grant of power to the court to discharge the executors for their failure to file an inventory. As was said by the supreme court of the United States in *Supervisors v. United States*, 4 Wall. 446, 18 L. Ed. 423, this power is not granted for the benefit of the court, but for the benefit of parties interested. "It is placed with the depository to meet the demands of right, and to prevent a failure of justice." This grant of power is obviously for the benefit of the heirs and creditors, who have a right to demand that the estate shall be administered in an orderly manner as provided by law, and that every safeguard provided by law for the preservation of the estate shall be employed and maintained.

The argument of counsel for applicant is very able, and it is due to his earnestness in presenting his points and the necessary labor involved in their due examination that the court has devoted so much time (when not otherwise occupied with the urgent demands of daily attendance in court) to their study with sympathetic interest, fully aware how far-reaching the decision may be in the administration of estates. The portions of the sections of the Code of Civil Procedure which petitioner invokes as bearing upon this application are as follows:

"Section 1436. Whenever a judge of a superior court has reason to believe, from his own knowledge or from credible information, that any executor . . . has wrongfully neglected the estate, or has long neglected to perform any act as such executor, he must, by an order entered upon the minutes of the court, suspend the powers of such executor until the matter is investigated.

"Section 1437. When such suspension is made notice thereof must be given to the executor, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require."

"Section 1443. Every executor must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge."

"Section 1450. If an executor neglects or refuses to return the inventory within the time prescribed or within such further time, not exceeding two months, which the court or judge shall for reasonable cause allow, the court may upon notice revoke the letters testamentary, and the executor is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure."

In the case of *McWillie v. Van Vacter* it was held that the purpose of requiring an inventory and appraisement is to secure regularity and method in the management of the decedent's estates, to secure fidelity on the part of those intrusted with their administration, and to guard the rights of all parties by furnishing means of accurate information as to the value of any estate in the course of administration: *McWillie v. Van Vacter*, 35 Miss. 428, 72 Am. Dec. 129.

One of the purposes of an inventory is to make of record a reliable schedule of the property claimed by the executor for the estate. The purposes of this record are manifold, and among others: 1. To charge the executor to safely keep and account for all such property as he by his inventory admits comes to his possession as such executor: Code Civ. Proc., sec. 1613. And 2. If, intentionally or through ignorance, the executor fail to include in his inventory property belonging to the estate, the omission may at once be called to the attention of the executor, and rectified at the instance of the persons interested.

The wisdom of requiring an inventory at an early period is plain. Until it is filed no one can know whether the executor

claims for the estate property which is well known to be a part of it. To illustrate: Rents of land belonging to the estate might be wasted and lost because the executor, not knowing the lands belonging to the estate, fails to demand them; and the heirs, believing the executor to be regularly collecting the rents, do not inform him of his error.

Were no inventory required it might frequently happen that dishonest executors would make no account of property belonging to the estate, and on account of lapse of time, death of witnesses and destruction of evidence, it would be impossible to establish the title of the estate to the property. As in the case at bar, argues the applicant, the executor receives in possession money left by the decedent; at present there are witnesses and evidence to establish his receipt of this money as such executor; but if he neglect filing his inventory until these witnesses die, he may then with impunity deny that he had ever received any money belonging to the estate. The statute says that in all cases this inventory must be filed within five months, and deprives the court of power to extend this time. (Section 1450.) If the executor had a right to neglect his statutory duty to file an inventory for one day after the expiration of the five months, he may neglect it for two days, a week, a month, a year, a decade—he may neglect it indefinitely. He need file no inventory at all; and (if he be a young man) he can wait until all of the heirs and creditors are dead, and all recollection of the existence of his testator is buried in the oblivion of dusty archives, and then make away with the estate.

It seems obvious that a speedy listing of the assets of the estate will tend to insure honesty in the administration, and to guard against errors and omissions. All the statute requires is the listing of such properties as have come to the knowledge or possession of the executor. It requires that when an executor takes possession of the property of a dead man as trustee for the heirs and creditors, that he shall file for record a written acknowledgment of the fact. No honest man can do less; no conscientious man would shirk the performance of so simple and (independent of the statute) plain a duty. If an executor violate his oath by refusing to return an inventory, there is no escape from the conclusion that his

motives are base and dishonorable, and that therefore he should be removed. If an executor neglect to perform his duty, it is not so clear by what motive he is actuated, but it is plain that he is shiftless and unfit to be intrusted with the property interests of others, and therefore he should be removed. The executor is trustee for the creditors and heirs, and, if he intends conscientiously to discharge his trust as an honest and competent business man, he can have no valid reason for neglecting to do that which in equity and by the plain provisions of the statute he is required to do.

In conformity with the spirit of the statute, an executor should file an inventory at the earliest moment possible; and if other property subsequently comes to his notice, he should file supplemental inventories from time to time. The time within which this must be done has been determined by the legislature. The language in section 1450—"such further time, not exceeding two months, which the court or judge shall for reasonable cause allow"—is obviously intended to definitely fix the time within which the inventory must in all cases be returned, and as a limitation upon the power of the court to extend the time.

In this case, it is insisted by counsel for applicant, the executors plainly come within the provision of sections 1436, 1437, Code of Civil Procedure, in having "long neglected to perform any act as such executors"; and it is submitted that the court having made and entered an order suspending the powers of the executors, and they being cited to show cause, and the verity of the petition not being impugned, the court "must" revoke their letters under section 1437.

Independent of sections 1436, 1437, however, it is claimed that the provisions of sections 1443 and 1450 make their removal imperative. The use of the word "may" in section 1450 is not permissive, but mandatory. Sedgwick, in his work on Statutory Construction, says: "This subject has been recently much considered in England on the true construction of the act called the County Courts Extension Act, which declares that in certain cases a judge at chambers may, by rule or order, direct that the plaintiff shall recover his costs. The word 'may' was here held not to be discretionary, but to mean 'shall'; and the court said that when a statute con-

fers an authority to do a judicial act in a certain case it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application; that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges, and the exercise of such power depends not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises": Sedgwick on Statutory Construction, 376.

In a well-considered case in New York the rule was laid down as follows: "Where a public body or officer has been clothed by the statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely and not peremptory": Mayor etc. of New York v. Furze, 3 Hill, 612.

This rule is cited and approved in *People v. Otsego Co.*, in which it is held that the words "authorized and empowered," in a statute conferring power on boards of supervisors to provide for refunding taxes improperly paid, are mandatory: *People v. Otsego Co.*, 51 N. Y. 406.

In the *Estate of Ballentine* it was held that the words "may set apart," in section 121 of the probate act, providing that the probate judge may set apart a homestead, are mandatory and leave no discretion with the judge, and that the word "may" is to be construed as "shall": *Estate of Ballentine*, 45 Cal. 699.

And in *Hayes v. County of Los Angeles* it is held that the word "may" in section 3804 of the Political Code, prior to 1889, providing that "any taxes, percentum and costs erroneously or illegally collected may, by order of the board of supervisors, be refunded by the county treasurer," is to be construed as "shall": *Hayes v. Los Angeles*, 99 Cal. 74, 33 Pac. 766.

Notwithstanding this array of authorities, I am inclined to think that the supreme court has in *Phelan v. Smith* indicated the rule to be applied in such a case as the one at bar, and this being the latest expression of that tribunal, it is entitled to the respect and obedience of this court.

I have given the argument of the learned counsel for applicant its full force, as far as the sentiments expressed are concerned; they meet my entire concurrence and are coincident with those to which I have given utterance for years, with iteration and reiteration tiresome to members of the bar and others compelled by circumstances to listen to the lectures of the court. Not a day passes, it may be said, without a repetition of these admonitions to administrators and executors and appraisers. But the conclusion of the counsel is one that I do not see my way clear to adopt under the latest construction of the supreme court. I am reminded that when this court, in the conviction that it was doing its duty, removed an administrator upon what seemed to it supersufficient premises, the appellate court gently admonished the probate judge that administrators have rights no less than courts have duties: *In re Welch*, 86 Cal. 183, 24 Pac. 943.

It would appear that the case of an executor is even stronger, for, as was said by Thayer, chief justice, in his dissenting opinion (*Holladay's Estate*, 18 Or. 168, 22 Pac. 752): "The removal of an executor should, upon general principles, require a stronger case than the removal of an administrator. The latter is appointed by the court, while the former is named in the will of the testator as the particular person above all others whom he desires to have to settle up his affairs, and his removal pro tanto revokes a will. A probate court is not justified in thwarting the intention of a testator in such a case, unless there is a legal necessity therefor." This idea seems applicable to the case at bar for reasons that may be gleaned from the record.

At all events, the question is, Shall these executors be removed from their trust for failure to file in due time an inventory and appraisal? If the statute be mandatory, there is no other judgment to pronounce; but if it be directory, as the supreme court has declared, the court should consider what exculpatory matter is presented. Many cases of this kind are on record; the court has too frequent occasion to comment thereon and to incur the ire of attorneys whose wrath is kindled by the censure of the court upon this item of negligence; but each case stands upon its own foot-

ing. It is the application of the law to a particular state of facts that makes a case; and each case must find its justification or exculpation in its peculiar facts. And in this case the court is called upon to punish the executors for an act which was the result of the confessed neglect of their counsel, involving no criminal intent or design on the executors' part. But, it is said, they cannot shield themselves behind their counsel. This is true, as a general proposition; but laymen who are usually selected as executors are allowed counsel to advise them and to discharge duties and to attend to details manifestly not within the common capacity of unprofessional men (Code Civ. Proc., sec. 1616), and why, then, since the discretion of the court is to be exercised, should we hang the layman for the laches of the lawyer? For it is a hanging matter, since the honest executor may for such an omission be deprived of his official life in an ignominious manner, his name stigmatized, his credit impaired or destroyed, his reputation ruined, because through some lapse of his attorney he has not, within the precise period, obeyed the direction of the statute. Why not suspend or disbar the lawyer, for it is primarily his offense? Harsh as such a suggestion may seem, it would be no greater hardship in some cases than the removal of an executor for dereliction of which only by a violent presumption of the law he may be held intelligently guilty.

I am of opinion that in the circumstances of this case the court would not be warranted in exercising its discretion by granting the application to remove the executors and revoke their letters testamentary.

Application denied.

An Executor or Administrator Who Neglects or Refuses to Return an Inventory within the time prescribed therefore is liable to have his letters revoked, and he becomes answerable on his bond for any injury to the estate occasioned by his dereliction of duty. The provision of the statutes on this point, however, is directory merely, and leaves the question of revocation within the discretion of the court; *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667; *Estate of Graber*, 111 Cal. 432, 44 Pac. 165; *Deck's Estate v. Gherke*, 6 Cal. 666; *Estate of Holladay*, 18 Or. 168, 22 Pac. 750; *Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095.

ESTATE OF WILLIAM HESSLER, DECEASED.

[No. 15,219; decided January 19, 1895.]

Homestead—Setting Apart from Community Property.—The requirement of Code of Civil Procedure, section 1465, that a homestead be set apart for the use of the surviving husband or wife and the minor children out of the common property, is mandatory, and if there is suitable property in the estate for the purpose it must be set aside.

Homestead—Setting Apart from Community Property Absolutely.—If a homestead is selected from the common property, it cannot be set apart for a limited period only. It is of no consequence that the widow is old and will not require the homestead for many years, or that she will receive three-fourths of the estate upon distribution. It is plainly the duty of the court, under the statute, to award a homestead to her, and it is then taken out of the estate and becomes her property, with absolute power of disposition.

Homestead.—There is No Limitation as to the Value of property set aside as a probate homestead.

Homestead.—Where there are No Children, the widow constitutes the family of the decedent.

Family Allowance.—In Determining What is a Reasonable Allowance for the maintenance of the family of a decedent, regard should be had to the condition of the estate and the mode in which the family had lived during the lifetime of the deceased.

Family Allowance.—The Right to an Allowance Commences from the Death of the decedent.

Funeral Expenses—Extent of Expenditures Therefor.—While suitable respect should be shown to the deceased in the matter of a burial place and monument, and while the court in its discretion can make allowance out of the estate therefor, yet large expenditures in this way represent the sentiments of the persons that incur them, rather than the necessary expenditure of trust funds, and courts should be cautious in allowing expenditures of this character.

Funeral Expenses.—The Cost of a Monument is a part of the funeral expenses, and a reasonable amount for this purpose may be allowed.

William Hessler died on September 22, 1894, and on October 18, 1894, Catherine Hessler, his widow, was appointed administratrix of his estate. An inventory was filed on October 17, 1894, and on November 20, 1894, the widow filed the petitions mentioned in the opinion; subsequently the absent heirs filed objections to the granting of these petitions.

Frank J. Sullivan, for petitioner.

W. H. Barrows, for absent heirs.

COFFEY, J. The widow of Wm. Hessler, deceased, presents three petitions in this matter:

First, that certain land described in her petition, with the dwelling-house thereon and appurtenances, be set apart to her as a homestead.

Second, that an allowance of \$500 per month be made to her out of said estate for her support pending the administration.

Third, that she be authorized to erect a monument at a cost to the estate of \$5,000, and be reimbursed for money already expended by her in the purchase of a burial lot for said deceased in the sum of \$280 more.

The heirs of said deceased other than said widow have interposed objections to the granting of each and all of these petitions.

At the outset it is conceded that each of these matters rests largely in the discretion of the court, but in the exercise of that discretion due consideration should be given to the following facts and circumstances:

1. That the property sought to be set apart as a homestead is worth at least \$8,000, and that in addition thereto the widow will receive all of the household furniture in said house, which is appraised at \$250;

2. That the value of the entire estate as shown by the inventory is \$76,953.16, and the entire income thereof is about \$300 per month;

3. That the widow is advanced in years and has no one dependent upon her, there being no children;

4. That under the law the widow will receive three-fourths of the estate upon distribution.

This application for a homestead is made under section 1465 of the Code of Civil Procedure, which provides that the court must select and set apart a homestead out of the common property of the decedent.

In the estate of Ballentine, 45 Cal. 696 (which has been repeatedly affirmed), it is definitely settled that this provi-

sion is mandatory. Therefore, if there is suitable property in the estate for the purpose it must be set aside.

In *Estate of Walkerly*, 81 Cal. 583, 22 Pac. 888, the court uses this language: "It is insisted by the appellants that the condition of the estate was such that, considering the liberal provision made for the wife and child of the deceased by his will, so valuable a homestead should not have been allowed. But this was a matter within the discretion of the court below, and, unless it appears that such discretion has been abused, we think this court should not interfere."

In that case, however, the estate was worth more than seven times as much as in this, and the homestead sought was worth only twice as much, and there was an infant child to be supported, beside the widow.

The petitioner here has already reached that time of life when the homestead cannot be much longer required by her. If it were within the power of the court to set apart this property to her for her life, there would not be so much objection. But under the construction put upon section 1468 of the Code of Civil Procedure in the case of *Phelan v. Smith*, 100 Cal. 170, 34 Pac. 667, the homestead cannot be limited as to the time of its duration. And under the decision in the *Walkerly* case it is likewise settled that there is no arbitrary limitation as to value.

It is easy to conceive of a case where the court would be practically compelled, in the exercise of a sound discretion, to decline to set apart a homestead, even though there were a dwelling-house among the common property of the decedent. As, for instance, if the estate were insolvent, and the whole or nearly all of the estate consisted of the property sought to be set aside, particularly where that property is of great value; thus, it would be manifestly wrong to set aside a homestead worth \$20,000 and leave nothing whatever for creditors where the amount of indebtedness was large.

It is true that the case at bar is not of the character above suggested, but in this case there is a large number of relatives who are heirs to only one-fourth of the estate, and their counsel argues that the three-fourths that remains to the petitioner constitutes more than she can possibly require during her lifetime without setting apart to her in addition this

valuable property which she can use only for a short time; and he appeals to the court to exercise that discretion which is vested in it, in such a case as that presented here, and prevent a manifest injustice by deciding that in this case there is no suitable property in the estate out of which to select a homestead.

The three petitions referred to are presented together, and the counsel for the foreign heirs asks that the court will consider them at the same time, and, if the prayer for a homestead is granted under the circumstances, the matters above urged should have some influence in fixing the family allowance at as low an amount as will suffice to satisfy the requirements of law and the absolute necessities of the case: See *Estate of Lux*, 100 Cal. 593, 35 Pac. 341. In that case the court say: "We are not to be understood as holding that the value of the property set apart for the use of the family under section 1465, Code of Civil Procedure, or the income of the property, is not to be considered in determining what is a reasonable allowance."

In any event regard should be had to the condition of the estate and the mode in which the family had lived during the lifetime of the deceased: *Estate of Lux*, 100 Cal. 593, 35 Pac. 341; *Estate of Stevens*, 83 Cal. 325, 17 Am. St. Rep. 252, 23 Pac. 379.

Estate of Walkerly, 77 Cal. 642, 20 Pac. 150, where in an estate of nearly \$800,000 the wife and child were allowed only \$420, and even this amount was objected to as excessive.

If the petition for a homestead is denied, no doubt the court could permit the petitioner to occupy the property in question during administration free of rent, and could allow her a much larger family allowance than it otherwise would; but if the homestead is set apart as prayed for, then counsel submits that the family allowance should be not more than one-half of the amount asked for.

The gross income of the estate being only about \$300 per month, taxes, repairs and other expenses will consume a portion even of this amount, and the family allowance should certainly not encroach upon the main body of the estate.

With reference to the application for leave to erect a monument and to be reimbursed for the expensive burial lot pur-

chased, all that has been said in relation to the condition of the estate and the other allowances sought by the widow is equally applicable.

While suitable respect should be shown to the deceased in the matter of a burial place and monument, and while the court in its discretion can make allowance out of the estate therefor, as decided in *Van Emon v. Superior Court*, 76 Cal. 589, 9 Am. St. Rep. 258, 18 Pac. 877; *Estate of Weringer*, 100 Cal. 345, 34 Pac. 825, yet large expenditures in this way represent the sentiment of the persons that incur them rather than the necessary expenditure of trust funds, and courts should be cautious in allowing expenditures of this character.

The widow very naturally and properly desires to see a costly monument erected in this case, but it must be borne in mind that the sentiment of other heirs may not be as strong in that direction, and it is not for the petitioner to donate the property of the estate intrusted to her hands for the gratification of her own feelings.

In all of the circumstances no more of the funds of the estate should be devoted to this purpose than such amount as is absolutely necessary to properly mark the grave of deceased, and all other and further sums that may be required to erect such a monument as the petitioner may desire should be contributed from her private purse, which is ample for the purpose.

The estate was appraised at \$76,953.16. It may be assumed that the real estate was more valuable before the panic of last year, and will be again more valuable. Of this total, there was \$23,153.16 of money, which is drawing interest at the rate of about five per cent per annum, say \$95 monthly. The rents of the property are \$268 monthly; total return, \$373. There are no debts of any kind. The property is community property. There are no children and no near kindred. The family of the deceased is the widow, who has been married over forty years.

A.—*As to the homestead*: It may be assumed that the homestead property has been, and will be, worth more than \$5,000, although at present it is not. The value, however, in this instance is of no consequence. It is the duty of the court to

set it aside to the widow. She is the family of the decedent: Code Civ. Proc., secs. 1465, 1468; *Estate of Ballentine*, 45 Cal. 696; *Mawson v. Mawson*, 50 Cal. 541; *Estate McCauley*, 50 Cal. 545; *Lord v. Lord*, 65 Cal. 84, 3 Pac. 96; *Kearny v. Kearny*, 72 Cal. 591, 15 Pac. 769; *In re Noah*, 73 Cal. 591, 2 Am. St. Rep. 834, 15 Pac. 290; *McKinne v. Schaeffer*, 74 Cal. 614, 16 Pac. 509; *Burdick's Estate*, 76 Cal. 639, 18 Pac. 805; *Walkerly Estate*, 77 Cal. 644, 20 Pac. 150; *In re Armstrong*, 80 Cal. 71, 22 Pac. 79; *In re Walkerly*, 81 Cal. 579, 22 Pac. 888; *In re Schmidt*, 94 Cal. 336, 29 Pac. 714; *In re Smith*, 99 Cal. 451, 34 Pac. 77; *Phelan v. Smith*, 100 Cal. 170, 34 Pac. 667; *Estate of Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

In *Re Armstrong* it was settled that the widow without children was entitled to the homestead. In the *Walkerly Estate* it was held that there was no limitation as to value. This point was most conclusively settled in *Re Smith*, a *Santa Clara* case, where the matter was forcibly presented. In that case the rents were between \$400 and \$500 per month, and the value about \$75,000. In these respects it was very similar to the one at bar.

It is of no consequence, as alleged by counsel, that the petitioner is old and will not require the homestead for many years. It is plainly the duty of the court to award the same to her. It then is taken out of the estate and becomes her property, with full power to mortgage or sell or devise as she sees fit: *McKinne v. Schaeffer*, 74 Cal. 614, 16 Pac. 509.

Even if the petitioner were worth millions it would be the duty of the court to set aside the homestead. It is a statutory right, and there is no way of evading the plain terms of the law.

Not even the insolvency of the estate would bar the petitioner from the homestead, for the reason that it was the intention of the law to protect the family, which in nine out of every ten cases needs such protection badly: *In re Bowman*, 69 Cal. 244, 10 Pac. 412. Hence it is of no consequence whether the widow obtains all or three-fourths of the estate. This should not cut any figure. Moreover, we have her sworn testimony that she has no property of her own

and is dependent upon the estate for support. She has been the partner of decedent for about forty years. The property in the estate was gradually accumulated by both. The relatives of decedent did not help to make it. Hence they should not be heard to protest successfully against this petition.

B.—*Family allowance*: The reason given for the homestead will also apply to the family allowance. The very case cited by the attorney for the absent heirs (*Lux's Estate*, 100 Cal. 593, 35 Pac. 341), lays down the rule that the condition of the estate and the mode of living during the lifetime of the spouses should control. Mrs. Hessler testified that the expenses of the family in her husband's lifetime amounted to \$550 or thereabouts every month. She gave a list of all articles which were absolutely necessary for her support and maintenance, and her position in society. The representative of the absent heirs says that \$250 will suffice, but that if the petition for a homestead be denied, the court can grant a much larger allowance and be more liberal. But such is not the proper construction to be placed upon the law. In such a case as the one at bar the court should grant a liberal allowance, even if in that way it anticipated the widow's share.

In volume 1, Woerner's American Law of Administration, page 165, section 79, we read: "If the estate is large, apparently solvent, and the allowance merely an anticipation of the widow's distributive share, a more liberal allowance will be justified than where it is small or insolvent; and what would be a reasonable allowance for one accustomed to privation and labor might be very unreasonable for one raised in affluence." Even if the widow had a separate estate of her own (which she has not), she would be entitled to a family allowance: *Lux's Estate*, 100 Cal. 593, 35 Pac. 341; *Stevens' Estate*, 83 Cal. 325, 17 Am. St. Rep. 252, 23 Pac. 379; *Walkerly's Estate*, 77 Cal. 642, 20 Pac. 150; *Schouler on Executors*, sec. 449; *Sawyer v. Sawyer*, 28 Vt. 245; *Strawn v. Strawn*, 53 Ill. 263; *Thompson v. Thompson*, 51 Ala. 493.

In this state, no matter what the amount of the allowance may be, it is undeniable that the right to an allowance commences from the death of the decedent; the only question for the court is the quantum.

C.—*Monument*: The application of the widow states that \$5,000 would be a suitable sum for a monument to be erected over the grave of her deceased husband. Objection is made that the amount is too large, and that the court should only allow a certain sum to decently mark the grave of deceased, and that any further expenditure should be made by petitioner herself. In reply to this objection petitioner's counsel says: It is conceded that if this estate were insolvent no such sum should be allowed. In the case at bar we have a comparatively rich estate, and no children, and no near kindred, and the widow naturally desires to erect a handsome monument to decedent's memory. Why should she not be allowed to do so? Who will be injured? No one. There are no children. The widow alone represents the family. She assisted in making the estate as valuable as it is. Certainly it is only just that she should be allowed to make a liberal expenditure in this matter.

It was held in McGlinsey's Appeal, 14 Serg. & R. 64, that where one leaves a good estate and no children or near kindred the cost of a handsome monument will be allowed.

In Pistorius' Appeal, 53 Mich. 350, 19 N. W. 31, it is said: "A delicate regard for all those whose pecuniary interests are likely to be diminished by the funeral charges should influence the legal representative; but at the same time, if the estate be solvent, he need not permit penurious and unfeeling kindred to rob the deceased of the last decent tributes to his memory."

In Bainbridge's Appeal, 97 Pa. 482, the court refused to control the discretion of an executor in using the entire residue of the estate, after paying legacies, in erecting a monument. In that case, however, the will provided for the expenditure.

It has been held in some states that the widow might of her own volition render the estate liable for this expensive monument: *Ferrin v. Myrick*, 41 N. Y. 315; *Porter's Estate*, 77 Pa. 43. But in this case the widow does not desire to do this. Hence, she has made due application to the court and given notice to all parties interested.

The expense of the monument is clearly a charge for funeral expenses, and a reasonable amount for this purpose should

be allowed: *Van Emon v. Superior Court*, 76 Cal. 589, 9 Am. St. Rep. 258, 18 Pac. 877; *Estate of Weringer*, 100 Cal. 345, 34 Pac. 825; 2 *Woerner's American Law of Administration*, sec. 358, and authorities in notes 6, 7 and 9.

Counsel for the foreign heirs does not contend that the cost of a monument is not chargeable to the estate. The only question with him is the amount. In the matter of monuments, as in the homestead and family allowance, courts have been liberal in all cases where estate has been solvent, and where the interests of children have not been lessened.

The court is of opinion that the applications should be granted; that the widow is entitled to a homestead and to an allowance of \$300 per month; and that the sum of \$2,500 may be appropriated for the purpose of erecting a monument to the memory of deceased.

So ordered.

Reasonable Expenses for the Funeral of a deceased and the erection of a monument at his grave are proper charges against his estate: *Estate of Koppikus*, 1 Cal. App. 84, 81 Pac. 732; *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388; *Estate of Smith*, 25 Wash. 539, 66 Pac. 93.

The Law Governing Probate Homesteads and Family Allowances will be found discussed in 1 *Ross on Probate Law and Practice*, 457-518.

ESTATE OF JOANNA TESSIER, DECEASED.

[No. 3092; decided October 22, 1895.]

Trust, When Created by Will.—Where a testatrix directs that there be paid monthly to her daughter a specified sum, and to her two granddaughters a like sum, share and share alike, and in case of the death of either of the granddaughters, without issue, the survivor to take the whole of the last named sum; and further provides that on the death of her daughter her estate shall go to her two grandchildren, share and share alike, or to the survivor of the daughter in case of the death of either of the granddaughters; and an executor is appointed by the will, but he is not named as trustee, a trust is created by the will which appoints an executor, but does not name him trustee.

Trust.—It is not Necessary to Use the Word "Trust" or "Trustee," or any particular form of words, in creating a trust, so long as the intention of the testator is expressed.

Trust.—A Person may Declare a Trust Either Directly or Indirectly—the former, by creating a trust *eo nomine* in the forms and terms of a trust; the latter, without affecting to create a trust in words, by evincing an intention which the court will effectuate through the medium of an implied trust.

Trust.—An Executor may be Both Executor and Trustee. If not named expressly a trustee, the court may determine from the whole will whether he is not to act as trustee.

Trust.—When the Income of Property is Given to One for Life, and, at his death, the property is given over to another, and no trustee is named in the will, the executor is the trustee to hold the property during the lifetime of the legatee for life.

Trust.—A Trust will not be Permitted to Fail for Want of a Trustee.—The probate court will determine whether a valid trust has been created, and may distribute the estate to a trustee, he being entitled to the possession and control of the same.

Trust.—When a Trust is Created, a Legal Estate Sufficient for the execution of the trust will, if possible, be implied.

Administration.—Duty to Close Speedily.—It is the duty of the court and executor to close an administration speedily, and as soon as the debts and expenses of administration are paid and there are persons entitled to the possession of the estate.

Executors.—Commissions of Executors and Administrators cannot be Apportioned until the close of administration, and an executor must close his account as executor before being charged as trustee.

Lowell J. Hardy, Jr., petitioner, in pro. per.

COFFEY, J. The facts of this application, as shown by petition and proof are that Joanna Tessier died testate on or about the twelfth day of January, 1884, in said city and county of San Francisco, leaving real and personal property therein, and being at the time of her death a resident thereof; that said deceased left a will, which was duly admitted to probate by said court on the eleventh day of February, A. D. 1884, and that thereafter, the executor named having renounced, letters of administration with said will annexed upon said estate were duly issued to L. F. George, who acted as such administrator until his death, to wit, on or about the first day of September, A. D. 1888; that upon the written request of Mrs. Delia A. Bell, the only issue of said decedent,

and due proceedings in that behalf, letters of administration with said will annexed upon said estate were duly issued by said court to the petitioner, L. J. Hardy, Jr., on the fifth day of September, A. D. 1888, and that he is still such administrator, and that said estate is not distributed; that on the twelfth day of February, A. D. 1884, due notice to the creditors of said decedent to present their claims against decedent, as required by law and the order of said court, was published; that on the twenty-eighth day of February, A. D. 1884, an inventory and appraisement of said estate was filed as required by law; that more than seven years have elapsed since the appointment of the petitioner as such administrator and the publication of said notice to creditors; that on the twenty-seventh day of August, A. D. 1895, the petitioner filed an account as such administrator, of his administration of said estate, up to the first day of August, A. D. 1895, showing that there was in his hands as such administrator in cash the sum of \$3,438.99 and certain real property described in the petitions; that said account was allowed and settled as filed; that all the debts of said decedent and of said estate, and all the expenses of the administration thereof thus far incurred, and all taxes that are due from said estate, have been paid and discharged, except the fees and commissions of the administrator; that the petitioner filed a supplemental report of his administration since August 1, 1895, to the twenty-third day of September, A. D. 1895; that said estate is now in a condition to be distributed to the petitioner as a trustee thereof under and pursuant to the provisions of said will; that it is provided in said will that the income of said estate shall be paid to Mrs. Delia A. Bell and Mabel F. White, now Mabel F. Sumner—Merced F. White, mentioned in said will as a devisee, having died when about seven years of age—during their joint lives; that said devisees Delia A. Bell and Mabel F. Sumner are alive, and that said estate cannot be distributed to them or either of them until the death of one of them; that by the provisions of said will a trust has been created, and said estate has been devised in trust, and the administrator is in legal effect named as a trustee in said will to carry out the terms thereof; that the residue of said estate now remaining in the hands of the

petitioner, as administrator, consists of the property described in the petition; that said estate was the separate property of said decedent, who died unmarried.

The prayer of the petitioner is that the residue of said estate, after payment of his fees and commissions, be distributed to him as a trustee under said will; that the administration of said estate be closed, and he be discharged from his trust as such administrator.

The petition is concurred in by the surviving beneficiaries named in the will.

The will is as follows:

"I, Joanna Tessier, of the City and County of San Francisco, State of California, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament.

"First. I will and direct that all my just debts which may exist against me at my decease may be settled.

"Second. I will and direct that my executor hereinafter named enter into the possession of all my real estate and receive and receipt for all the rents, issues and profits thereof, and from the proceeds thereof pay all taxes, insurance, assessments and costs of repairs on said premises, and out of the residue of said rents and profits pay monthly to the Hibernia Bank, to be applied in liquidation of the mortgage held on my property, the monthly interest and one hundred dollars principal.

"Third. After the payments provided for as aforesaid, I direct that the sum of fifty dollars be paid monthly to my daughter, Delia A. Bell; and fifty dollars to my grandchildren, Merced Funda White and Mabel Florence White, to be divided between them share and share alike, and in case of the death of either without issue the survivor to take the whole thereof.

"If at the end of every succeeding twelve months there shall remain any money so received unexpended, the same shall be divided into two equal parts, the one part to be paid to said Delia A. Bell, the other to said grandchildren equally. Said payments to said Delia A. Bell and to said grandchildren are to be continued during their natural lives. On the death

of either of said grandchildren without issue the survivor to take her share.

"On the death of Delia A. Bell I give and bequeath all my real and personal property to my said grandchildren, share and share alike, or to the survivor of said Delia A. Bell in case of the death of either of said children.

"Fourth. In case any of the buildings situated and being upon any of the lots of land owned by me shall be destroyed by fire, I direct that the land be sold and the proceeds of said sale, together with the money realized from the policy of insurance, be used in the purchase of other productive property.

"Fifth. I give and bequeath all my household property, consisting of furniture, bedding, etc., etc., to my said grandchildren share and share alike.

"Sixth. In case any money should be realized out of the foreclosure of the mortgage held by me on the property formerly owned by me situated on the easterly side of Waverly Place, I direct that the same be re-invested in the purchase of productive real estate in this city; and if said property is sold on a decree foreclosing said mortgage I authorize my said executor to purchase the same for the benefit of my estate, or, in case of bidders at the sale, to allow said property to be purchased by others as in his discretion may seem for the best interests of my estate.

"All rents received from the property at any time in the hands of my said executors is to be divided as provided aforesaid and in pursuance of and accordance with the provisions aforesaid.

"Seventh. I hereby nominate and appoint George W. Gibbs executor of this my last will and testament. I hereby revoke all former wills."

Duly signed and witnessed July 19, 1882.

The administrator of said estate submits the proposition for a distribution to himself as a trustee of the residue of said estate.

A trust has been created by the will of said decedent; whether it is an express or implied trust matters not. The court thinks it is an express trust under section 857 of the Civil Code, because the will has created a trust for all the

purposes mentioned in said section, and being in writing, complies in that respect with section 852, Civil Code.

It is not necessary to use the word "trust" or "trustee," or any particular form of words, in creating a trust, so long as the intention of the testator is expressed: *Perry on Trusts*, par. 82, 112; *Luco v. De Toro*, 91 Cal. 405, 27 Pac. 1082.

A person may declare a trust either directly or indirectly; the former by creating a trust *eo nomine*, in the forms and terms of a trust; the latter without affecting to create a trust in words, by evincing an intention, which the court will effectuate through the medium of an implied trust: *Lewin's Law of Trusts*, p. 108.

An executor may be both executor and trustee: *Lewin's Law of Trusts*, p. 204.

If not named expressly a trustee, the court may determine from the whole will whether he is not to act as trustee: *Perry on Trusts*, par. 262; *Toronto Trust Co. v. Chicago R. R. Co.*, 7 Am. Prob. Rep. 294.

When the income of property is given to one for life, and at his death the property is given over to another, and no trustee is named in the will, the executor is the trustee to hold the property during the life of the legatee for life: *Perry on Trusts*, par. 262.

By the will under consideration the executor is directed to enter into the possession of all real estate, receive all rents, etc., and out of the proceeds thereof pay all taxes, etc., and out of the residue of income pay *Hibernia Bank* certain sums, also to pay to *Delia A. Bell* and the two granddaughters certain sums of money during their natural lives.

By said will all the estate is bequeathed and given to said grandchildren on the death of said *Delia A. Bell*, but not before such death.

The executor is also directed and empowered to invest in the purchase of productive real estate any money to be derived from foreclosure of a certain mortgage; or to purchase the property if sold under a foreclosure.

A trust has been without doubt created.

The intention of the decedent can be executed only through a trustee, otherwise the administration of said estate could not be closed until the death of *Delia A. Bell*; or, if the

testator had postponed the final distribution during lives in being, including the life of the administrator (Civ. Code, 715), until after the death of the administrator; during which time no final commissions or fees could be allowed to the administrator.

Commissions cannot be apportioned until close of administration of estate: Estate of Barton, 55 Cal. 87; Code Civ. Proc., 1618.

It is the duty of the court and executor to close the administration speedily and as soon as the debts and expenses of administration are paid and there are persons entitled to the possession of the estate: Estate of Pritchett, 51 Cal. 568; Estate of Hinckley, 58 Cal. 457, 518; Code Civ. Proc., secs. 1652, 1665.

An estate may be distributed to a trustee, he being entitled to the possession and control of the same: Code Civ. Proc., sec. 1699, amendment of 1895; Code Civ. Proc., sec. 1702, amendment of 1891.

A trust will not be permitted to fail for want of trustee: Hill v. Den, 54 Cal. 6-20; Estate of Hinckley, 58 Cal. 457; Smith v. Davis, 90 Cal. 25, 25 Am. St. Rep. 92, 27 Pac. 26; Code Civ. Proc., sec. 1702 (amendment).

The probate court will determine whether a valid trust has been created: Estate of Hinckley, 58 Cal. 458, 518.

The executor must close his account as executor before being charged as trustee: Perry on Trusts, par. 263.

Wherever a trust is created a legal estate sufficient for the execution of the trust shall, if possible, be implied.

The court has in some instances supplied the estate in toto, as where a testator devised to a feme covert the issues and profits of certain lands, to be paid by his executors, and it was held that the land itself was devised to the executors in trust to receive the rents and profits and apply them to the use of the wife: 1 Lewin's Law of Trusts, 213.

By distributing this estate, which is now in condition for such distribution, to a trustee, the court will put the estate in the best condition for the execution of the intention of the testator and the law, and enable the administrator to close his work, now in the eighth year, and receive compensation for his services.

All parties interested in said estate consent to these proceedings, and, there being no limitation in the will upon their power to alienate their interests, it would appear that the court should exercise its discretion, if any, in their favor: Civ. Code, 699-867.

Application granted.

The Commissions of an Executor or Administrator are not payable until the close of the administration and the settlement of his final account. They will not be settled and allowed piecemeal as the administration progresses: Estate of Miner, 46 Cal. 564; Estate of Dunne, 58 Cal. 543; Estate of Rose, 80 Cal. 166, 22 Pac. 86; Bemmerly v. Woodward, 136 Cal. 326, 68 Pac. 1017; Estate of Strauss, 144 Cal. 553, 77 Pac. 1122; Estate of Dewar, 10 Mont. 422, 25 Pac. 1025. When there are two or more executors or administrators, the commissions should be apportioned to each in proportion to the labor he has performed. Each is not entitled to an equal share merely because of his office: Estate of Carter, 132 Cal. 113, 64 Pac. 123; Estate of Coursen (Cal.), 65 Pac. 965; Hope v. Jones, 24 Cal. 89; Dudley's Estate, 123 Cal. 256, 55 Pac. 897. Neither can one, by excluding the others against their will from any participation in the administration, deprive them of all claim to compensation: Dudley's Estate, 123 Cal. 256, 55 Pac. 897.

ESTATE AND GUARDIANSHIP OF GAGE H. MOXEY, AN INCOMPETENT PERSON.

[No. 27,338; decided March 6, 1903.]

Guardian of Incompetent—Matters for Consideration in Appointing. In proceedings for the appointment of a guardian for an alleged incompetent and for her estate, the opinion of an alienist as to her mental condition over sixteen years before, when he visited her in a social way and conversed with her, is not too remote for consideration, because in such cases the personal history of the subject and her heredity, temperament and diathesis, are taken into account to enable an intelligent appreciation to be had by the investigator, whose judgment must be instructed as to effect or defect by searching for cause, however far back it may seem necessary to trace it. The concern of the court, however, is not with the condition of the alleged incompetent at such previous time, but with her status as to competency of mind at the date of the application for guardianship and at the

time of transactions therein referred to as conceived in fraud with a view to impose upon her and obtain her property through her mental weakness.

Guardian of Incompetent—Nature of Proceedings to Appoint.—A proceeding for the appointment of a guardian for an incompetent person and for his estate, as provided by section 1763 of the Code of Civil Procedure, is not an inquisition in lunacy, but an inquiry as to mental competency to manage one's property.

Insane Persons Distinguished from Incompetent Persons.—"Insane" and "incompetent" are not necessarily convertible terms; a person may be incompetent by reason of insanity, or from some other cause incapable of caring for his property.

Guardian of Incompetent—Jurisdiction of Court to Appoint.—Whatever doubt existed in former times as to the authority of courts to appoint guardians for incompetent persons, as distinguished from persons actually insane, is now removed in this state by the explicit language of the statute, conferring jurisdiction in this class of cases, and making it the peculiar province of this tribunal to protect any person proved to be within the purview of the statute.

Guardian of Incompetent—Matters for Consideration in Appointing. In determining whether a guardian should be appointed for an alleged incompetent woman, it is important to consider the value and character of her property, the persons by whom she is and has been surrounded, and whether they are not seeking to profit by her mental weakness and to obtain advantages which in other circumstances she might resist, and also whether she has in fact been overreached and imposed upon, and is in the exclusive control and keeping of persons who have acquired absolute dominion over her and deceived her to their own gain.

Betrothed Persons—Business Transactions Between.—The relations of betrothed persons being of an extremely confidential character, the law imposes, in case of business transactions between them, the utmost circumspection and care to forefend fraud. If the woman is about to convey property to the man, he should see that she has the assistance of a competent attorney.

Betrothed Persons—Conveyances Between—Suggestions of Fraud.—The fact that a deed from a woman to her fiancé purports to be based on a pecuniary consideration, when in fact there is none, is a strongly suspicious circumstance, particularly when she is suspected of mental weakness.

Betrothed Persons—Conveyances Between—Secrecy.—Where a woman, suspected of mental weakness, gratuitously conveys property to the man to whom she is betrothed, the fact that the deed is prepared and executed in haste; that the gift is excessive; that there is lack of opportunity for calm consideration and reflection; that the deed recites a money consideration, and a covenant of warranty and

an agreement to furnish an abstract up to date; that the grantee virtually dictated or supervised the making of the deed, while his intimate friend and associate prepared the instrument; and that the grantee is admitted to have influence over the grantor, through her fatuous fondness for him—all these are circumstances strongly suggestive of fraud.

Marriage—Mercenary Alliances not Favored.—Mercenary marriages are abhorred in equity, and not favored otherwise where the surroundings point to an unworthy motive, and the conduct of the party who is pecuniarily benefited suggests insincerity or bad faith, and indicates that he has taken an undue advantage of the other's weakness of will or confidence in him, springing from intimacy of relation.

Marriage—Duty to Make Public.—When parties are married, though ceremonially, it is their duty to themselves and their obligation to the State to follow up the rite by living together as husband and wife and affording public evidence of that relation. So far as the immediate interest involved is concerned, it matters little compared with the interests of organized society.

Marriage—Publicity—Nature and Sanctity of Institution.—Marriage is more than a contract; it is a status; it is an institution of society and its foundation; it does not come from society, but contrariwise; it is the parent of society, and it is extremely important that its stability shall be secured, and that its contraction should be surrounded by safeguards and its sanctity upheld; and every solemnization of marriage should be in the face of the public; there should be no secrecy either in ceremony or in connubiation.

Mental Incompetency—Sudden Change of Affections.—Sudden and groundless suspicions of the affection and fidelity of tried and trusted relatives and friends are common symptoms of unsoundness of mind, and so are hastily conceived affections for and confidences in mere strangers and newly made acquaintances.

Mental Competency—Value of Opinion Evidence.—The opinion of witnesses as to the soundness of mind of a person sought to be put under guardianship as an incompetent are not entitled to so much weight as facts, especially when conflicting; for when a fact is established, it is a fact and cannot be overcome, while an opinion is but an opinion, and it may be true or false in its inference.

Guardian of Incompetent—When Should be Appointed.—The claim of the petitioner in this case that the respondent is incompetent, that she is incapable of taking care of herself and her property, and that she is likely to be imposed upon by designing and artful persons, is held by the court upon an examination of the evidence, to be fully made out, and the petition for the appointment of a guardian of her person and estate is granted.

Application for letters of guardianship.

Bishop, Wheeler & Hoefler, L. M. Hoefler, William Rix, C. W. Cobb and E. M. Rea, for applicant, Harry Lester Mandeville.

Irwin J. Truman, Jr., F. S. Oliver, S. V. Costello, for respondent, Gage H. Moxey, otherwise Gage H. Phillips.

COFFEY, J. The applicant is the son in law of the respondent, whom he charges with incompetency under the statute, alleging that she is over the age of fifty-six years, a resident of San Francisco, and mentally incompetent to manage her property, and that by reason of disease and weakness of mind she is unable unassisted to properly manage and care for herself and her property, and by reason thereof would be likely to be deceived and imposed upon by artful and designing persons, and that she has been so deceived and imposed upon by certain persons named answering that description. The circumstances recited in support of this allegation are that some time prior to the month of May, 1902, respondent was the owner of a redwood timber ranch in Mendocino county, two thousand four hundred acres in area, worth about \$24,000, and also a parcel of land and improvements thereon in Boston, Massachusetts, valued at \$200,000; she being then a resident of San Francisco as an unmarried woman, being the divorced wife of one Harrison F. Hawkes; that at about this time she met one John D. Hoover, who was conducting an establishment in this city known as the Hoover University of Physical Culture, and in whose employ was one Oliver N. Moxey, an unmarried man, twenty-six years of age, these two persons having classes for the teaching of physical culture and being the professors in the institution mentioned; that respondent undertook to receive instruction therein, and in that way she made their acquaintance; that they, learning of her mental weakness and material wealth, with design of defrauding her, and by deceiving and imposing upon her to acquire her property, conspired, confederated and combined in that behalf, and, in the execution of their purpose, it was agreed upon between them that Moxey should pretend to pay his attention to her with the view of marriage, and that he should induce her to voluntarily con-

vey to him as a gift said real property; that, in pursuance of said plan and scheme, on or about the 23d of May, 1902, Moxey having become engaged to marry respondent, induced and persuaded her to deed over to him without consideration the Mendocino ranch, and that he caused to be prepared a certain deed of that date conveying to him said property for the purported consideration of \$10, although in fact no money or other good consideration whatever passed from said Moxey to her, and that thereupon Moxey caused a deed of said premises to be recorded in Mendocino county, and thereafter exercised full dominion over the property and shortly afterward mortgaged the same for \$5,000, which he appropriated to his own use; and that subsequently, and in furtherance of their common plot and project, Hoover, in his own hand, prepared a deed of the Boston property purporting to convey the same from respondent to Moxey in consideration of \$20, although in truth no actual consideration whatever passed between them; that this deed was so prepared by Hoover, who accompanied Moxey and respondent to the office of a notary, where she, acting under the influence and control of Hoover and Moxey, signed and acknowledged a deed to said property and delivered it to Hoover; that afterward and on the same day Moxey accompanied respondent to San Jose and there, before a justice of the peace, was married to her, and, it is averred by applicant here, that this ceremony was celebrated and consummated solely for the purpose of perfecting the scheme concocted between him and Hoover to obtain her property and the whole thereof that was subject to her control. After the marriage Hoover took the last-mentioned deed to Boston and caused the same to be recorded. During the period from the first acquaintance of the respondent with Hoover and Moxey the former actively promoted the pretended suit of the latter for her hand by impressing upon her the great love and affection which the said Moxey professed for her, and they both sought to impress upon her mind the great advantage of a marriage with Moxey. The result of the sinister scheming and mutual machinations of these two men was the securing of the deeds and the procuring of the marriage as related.

Such is the situation in epitome as described in the applicant's petition.

It is not the case of an alleged lunatic, within the legal meaning of the term, or of a person who sometimes has understanding and sometimes not; although it is in evidence that respondent spent five years as a patient in a sanitarium or private hospital for mental diseases in Brookline, Massachusetts, from 1881 to 1886, committed thereto by a magistrate upon physician's certificate, at which time she was thirty-four years old and the mother of one child; she herself testifies that she went to this institution voluntarily, because she had peritonitis and uterine trouble and sought rest and treatment under the care of her friend, Dr. Channing, the superintendent of this retreat or home for persons suffering from nervous disorders. This doctor was not allowed by the court to testify as to her condition mentally or her acts while in his charge, but another physician, Dr. Jelly, of Boston, an alienist of experience, chairman of the Massachusetts State Board of Insanity and supervisor of all the insane hospitals in the state, and examiner in insanity in Suffolk county, was permitted to give in evidence the result of his observation when he saw her in a social way several times during her sojourn in the sanitarium, and he relates that on one occasion shortly before her release he had quite a conversation with her about herself; he was familiar with her history, and he took great interest in her because she was suffering very much, and he and Dr. Channing thought it was a case that ought to get well, and the two physicians talked it over many times, but his own calls at the asylum were social and he did not there visit her as a patient; her mental malady was acute suicidal melancholia, and this condition might have arisen without any physical ailment and it might have been caused by bodily illness; but he had not seen her in nearly twenty years.

It is objected that this testimony is too remote for consideration in this inquiry; but in such cases personal history of the subject and her hereditary, temperament and diathesis are taken into account to enable an intelligent appreciation to be had by the investigator, whose judgment must be instructed as to effect or defect by searching for cause, howsoever far back it may seem necessary to trace it. What alienists denominate the etiology of the case is of value in reaching a conclusion, where mere casual observation of a condition so obscure in its

diagnosis at times would be without avail. The evidence in this record as to family history is meager, but enough appears to show that several members of it were subject to mental infirmities. Whether or not at this distance of time there are any sequelae surviving of the distemper which caused her confinement in the sanitarium is difficult to determine. The concern of this court, however, is not with her condition in the period indicated, the lustrum of 1881-86, but with her status as to competency of mind at the date of the application and at the times of the transactions therein referred to as conceived in fraud with a view to impose upon her and obtain her property through her mental weakness.

This is not an inquisition in lunacy, but an inquiry as to mental competency to manage one's property. "Insane" and "incompetent" are not necessarily convertible terms. A person may be incompetent by reason of insanity, or from some other cause incapable of caring for his property. The statute speaks of the "insane or incompetent" person and is here quoted at length:

"When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend that any person resident of the county is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing": Code Civ. Proc., sec. 1763.

A subsequent section undertakes to define the terms used by declaring that the phrase "incompetent," "mentally incompetent," and "incapable," shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons: Code Civ. Proc., sec. 1767.

The intention is plainly benevolent in the expression of this statute, and it is not too laudatory of the law to say that it represents the most advanced and enlightened legislation upon

this subject so far enacted. At the common law the persons included within the terms of the declaratory section were without relief, and it was only by the beneficent assumption by courts of chancery of jurisdiction and their wise application and adaptation of the general principles of justice and humanity to the case in hand that a remedy was obtained, but, until the progress of legislation made the matter certain, the exercise of equitable jurisdiction was engaged in timorously.

In the Matter of Barker, 2 John. Ch. 232, the great Chancellor Kent said that the difficulty which arose with him was as to the extent of his jurisdiction, for the suggestion was that the respondent's mind was so worn out by old age so as to render him incapable of managing his property, and that thereby he stood in absolute need of the protection of the court against his own acts, and against the practices of evil and designing men, and the chancellor remarked that the case as stated was deeply interesting to humanity, and presented a strong appeal to the powers and justice of the court, but he had misgivings as to his authority to interfere in the premises, for mere imbecility of mind, not amounting to idiocy or lunacy, had not until a then very recent date (1816) been considered in England as justifying an interference with the liberty of a person over himself and property. Indeed, prior to the Revolution no case had gone so far. Lord Hardwicke disclaimed any authority over mere weakness of mind, yet Kent thought it certain that when a person became mentally disabled, from whatever cause the disability might have arisen, he was equally a fit and necessary object of guardianship and protection, and the court of chancery was the constitutional and appropriate tribunal to take care of those who were incompetent to take care of themselves, and without such a power, there would be a deplorable failure of justice. The object is protection to the helpless, and no matter what causes the condition, sickness, vice, casualty or old age, when it is evident to the court that the person is reduced to mental weakness and disqualified for the ordinary management of his affairs, it becomes a case for equitable interposition and is within the reason and necessity of the trust. The inquiry is, however, peculiarly delicate, in most cases, because it concerns the character of the party, and his natural rights, and

because of the difficulty there is in ascertaining the extent of the decay of the mind as a basis for judgment. Whatever doubt existed in the minds in former times as to the jurisdiction of the courts is now removed by the explicit language of the law conferring jurisdiction in this class of cases, making it the peculiar province of this tribunal to protect any person proved to be within the purview of the statute. Is the respondent proved to be such a person? Is she in that class of persons whose minds have become weak, though not insane, by reason of age, disease, or any other cause, and who would, in that case, be left without protection and liable to become the victims of folly and fraud? It is urged here by her counsel that no case has been made out against her because she has not been shown to be so far debilitated in mind as not to be equal to the general management of her own affairs, and that, in the language of Lord Erskine, she is competent to common purposes. What are the affairs to the management of which she is incompetent? Those affairs may be of such a nature that a certain degree of impairment of memory may render her incompetent to their management, and yet she may not be of unsound mind. It is not actual insanity, it is repeated, that is here in question, but it calls as strongly for the protection of the court, not only in the interest of the individuals affected, but as it concerns the state in the prevention of wrong to citizens and the conservation of the rights of person and property. This is the primary purpose of the proceeding. The public ends to be served are the protection of property, the prevention of fraud, and the providing against the incurring of a public charge by consequence of improvidence inducing indigence. Thus it will be seen that not only is the welfare of respondent involved, but the general interest of the community of which she is a component is implied.

It is important, in this inquiry, to consider the value and character of the property belonging to the respondent, and also to regard the persons by whom she is and has been surrounded, and whether they are not seeking to profit by her mental weakness and to obtain advantages which in other circumstances she might resist; and it is furthermore important to ascertain whether or not the alleged incompetent has in fact been overreached and imposed upon, and whether she

is in the exclusive control and keeping of persons who have acquired absolute dominion over her and deceived her to their own gain. It is claimed that she has been victimized owing to her infirmity, and that the transactions in themselves and their circumstances establish her incompetency, and that through her own folly and the fraud of the persons named in the petition she has been deprived of her entire property and effects to their enrichment, and that this was the result of a conspiracy concocted by them.

The property over which respondent had power of disposition, and which she transferred by deeds to Moxey, is estimated to be worth over \$200,000, consisting of valuable lands in California and town property in Boston, improved city lots well rented. Respondent gave this property to Professor Moxey, to use her own words, because she loved him. The timber lands were deeded to him after her engagement and before their marriage, and the Boston lots on the day of that event, but prior to the ceremony. The recipient of this token of affection she first met in January, 1902, at Hoover Hall, a school of physical culture, where she was introduced to him by one of the class in which she was taking instruction and where he was an instructor. She was then about fifty-five years of age, born in 1847; he was about twenty-nine, born in 1873—a disparity of about twenty-seven years. In a short time the teacher became attentive to his pupil, and in the space of less than a month, on the 22d of February, 1902, while they were out at the ocean beach, sitting on the sand, they became betrothed. She had been married before, when she was twenty-two or twenty-three years old, to one Harrison F. Hawkes, with whom she lived for about twenty-one years and from whom she was divorced in 1894 in California by default; she came here for the purpose of obtaining a legal separation, leaving her husband behind without information as to her intention; she had been in this state prior to that time, and, indeed, was an extensive traveler, having, after her residence in the Channing Home in 1886, spent a year in a tour of Europe and Egypt and subsequently crossing the continent to the Pacific coast on her own account. Besides the property mentioned she has a life interest in a trust created by her

mother, the principal on her own decease to go to her daughter, her two brothers, David and Leonard, being the trustees.

Mr. Moxey was a bachelor at the time of the betrothal, and had no means save his income from his occupation or profession as a physiculturist. His own story of his struggles and success is not an unusual recital: Born in England, he spent there the greater part of his youth—at school from five to fifteen years of age and then working on a farm until coming to America, when seventeen; hiring out as a farm hand for about two years until he started for this state, and, on reaching here, engaging at first in farming in Santa Cruz county and continuing thereat for about six months; after that he spent about two months in San Benito county, thence to San Jose on an initial visit, where he remained two or three months; he was not employed at anything worth remembering during this interval, but upon leaving San Jose he went to work for the railroad company all along the Coast Division for about twelve months, when he undertook a scholastic course at the Garden City Business College, pursuing his purpose in that institution for about two years, going thence to a clerkship in the freight office of that city for several months; after that he was engaged in book canvassing in various towns and soliciting for commercial orders, for a health food under the auspices of the Hoover Health Club, and he assisted Mr. Hoover in the way of physical culture at first in San Jose, and, finally, he brought up in San Francisco about three years since in the employ of Mr. Hoover as a teacher of physical culture in what is called the Hoover University of Physical Culture, at 1319 to 1327 Market street. It was in this place while so occupied that he met respondent some time in January, 1902, when he was introduced to her by a Mrs. Shipman, to whom he had introduced himself at an earlier hour on the same day in the same hall. Respondent joined his class and took lessons several times a week, coming to the hall every day, sometimes twice a day, and the two increased in the intimacy of their acquaintance until their engagement, which occurred on Washington's Birthday. The day was not set at that time for the ceremony, but subsequently, about six weeks or two months prior to that date, July 14th was agreed upon for the event. Mr. Moxey is not an adept in dates; he himself says

that his memory is very poor in that particular—many important events in his life he cannot remember as to date; but these two items of interest are indelibly impressed upon his mind, the dates of his betrothal and espousal. At the time of their first meeting he was acting as chief instructor for Mr. Hoover, and here it may be important to note that the latter named gentleman testified that during his absence from the classrooms his place was filled by Professor Moxey, and that he was absent therefrom from January to June, 1902, having been injured by a street-car accident in December, 1901. He went to Colorado to the home of his parents a few days before Christmas, and returning to his room here remained there convalescing from January to June 2, 1902, rarely going outside, and virtually abandoning all affairs of business until the latter date, when, venturing into his physical culture school, he met respondent near the entrance to the hall, near the stairway, and he was introduced to her by a Mrs. Ruthie, one of his pupils, as Mrs. Phillips. The latter was at a distance and his pupil said to him: "Don't you know who that lady is standing there?" Hoover replied that he did not, whereupon Mrs. Ruthie remarked: "That is Professor Moxey's sweetheart; everyone in the class knows that." He did not know, because he had not been attending the class for so many months, Moxey being on duty in his stead. Before that date, June 2, 1902, Hoover swears he had never seen respondent. Respondent herself on her first examination stated that she did not meet Hoover until the last of May or the first of June, 1902, although she might have talked to him over the telephone in the middle of May, 1902. It was sometime in May, she said, she first met him; he had been ill. Later on in the course of the trial she swore positively that she first saw him on the 2d of June, 1902. This testimony is in conflict with that of Mrs. Mary Turman, styled Dr. Turman, a quondam teacher in the school, and a former pupil of Professor Hoover, whom she had known for several years, and in whose institute, she says, she took lessons regularly in the month of April, 1902. She had an office in the same building. In that month she met him in the schoolroom and also saw respondent there; he asked this lady doctor if she had met Mrs. Phillips, and she said "No." He pointed out a lady on the floor and said that

she was a wealthy woman and told her to ask Mrs. Patten, his private secretary, to effect an introduction. Professor Hoover said that Mrs. Phillips was a friend of Professor Moxey's and was in love with him. Respondent was present in the school-room at the time Hoover said this to Mrs. Turman, but was not within hearing. Hoover further said that Mrs. Phillips had proposed to Moxey; immediately after this conversation Mrs. Turman was introduced to respondent.

Professor Hoover denies absolutely and in detail this statement, but admits that he spoke to Mrs. Turman of a Mrs. Phillips, another person, a wealthy woman living on Van Ness avenue, near St. Luke's church, whom it was desirable to secure for a pupil. He says that he was not in the classroom or hall while any part of the exercises was in progress during the period of January to June 2, 1902, although he had his private office in the building and received the accounts there, and occupied apartments where he dwelt in the same edifice, but he attended to very little business connected with the institute and did not know who composed the class and rarely visited the hall itself.

In comparing these statements there is an element of probability in that made by Mrs. Turman, arising from the admission of Mr. Hoover and from the circumstance of his proximity to the place and person whom the conversation concerned. Hoover admits enough to throw doubt upon his denial of the substance of the story, which in itself is circumstantially probable. His statement that he did not know the names of the members of his school at that time may be consistent with his position as the head of the institution, but it seems he knew some and was presumed by Mrs. Ruthie, his pupil, to be acquainted with all, as is inferable from her surprise that he did not know what everyone in the class knew—that is, that Mrs. Phillips was Moxey's sweetheart. The other Mrs. Phillips, to whom he alludes, as being desirous of securing as a pupil, is rather nebulous, except as her points of age and wealth and interest in physical culture coincide with the respondent. It seems, from what he says, that Mr. Hoover did give to Mrs. Turman names of persons to call on who were interested in his science, and that he preferred pupils of the description which embraced both this respondent and her

namesake. The importance of this testimony is primarily that it either implicates or exculpates Hoover in the alleged conspiracy to obtain the property of the respondent, comprising transactions dated as far back at least as May 23d, 1902, when the deed to the Mendocino property was executed, and his denial, if true, being equivalent to the establishment of an alibi, originally carried the inference that at the time laid in the accusation he was in another place, and that it was impossible for him to have met her prior to the 2d of June, 1902, because of his physical infirmity and necessary confinement to his room and absence from his classes during the year 1902 up to that date. That it was not impossible may be seen by an examination of his own evidence, from which it appears that he was out of his room almost every day, sometimes for half an hour at a time or an hour, and that he occasionally went to his private office and to the institute to talk business, and that he was in the City Hall as a witness twice in May, on the 7th and 27th of that month.

It was close to this time, to wit, on May 23d, 1902, that the redwood transaction took place. As to the first deed, she says it occurred this way: She and Moxey were lunching at the Techau Tavern when she said to him, "I am going to deed my redwoods to you to-day." She had not previously communicated her intention to him; she had said nothing to him at all on that subject, although she had been thinking about it; it was a surprise to him and so intended by her; this was about the hour of noon; immediately after luncheon they went to the law office of Mr. Delmas, a lawyer whom neither of them knew, except as everyone knows him because of his eminence in his profession, to seek his services to draw this deed, and there in that office in the Call building a young man was found alone, whom Moxey asked to make out the paper. She did not know whether this young gentleman was Mr. Delmas or his clerk; no introduction took place; no recognition was had, for neither knew the other. Moxey entered and simply said, "I want you to make out a deed," and the gentleman consented. Then she said, "I am going out; after the deed is made out I will come back and sign it," and she went out, remaining away about an hour, then returned and signed it and then went downstairs and acknowledged it before a notary in the same

building, in which the Columbian Bank is situated; the deed was recorded in Ukiah; but another document had to be drawn there because the first was faulty; McNab and Hirsch were the attorneys in Ukiah; this second deed was made in June or July, while she was at Ukiah; her memory was very vague about the circumstances of the making of the second deed; Moxey was there; she was not certain which of the firm of attorneys drew the instrument; she went there one day with Moxey; she did not think she knew anything about that deed being made, did not remember it being changed; knew it was altered because the first was not made out right; did not go before the notary again; did not think she had signed any other paper; had no recollection on that score; could not recall having been before a notary in Ukiah; did not know the deed was made over entirely, but knew it was changed; did not remember acknowledging the document before Mr. Hirsch, the notary; she thought it was somewhere about the 1st of July, 1902, that the deed was altered—upon these points her memory was very uncertain and treacherous; indeed, it may be said that she had no memory of the circumstances, and that her description of what took place is unreliable to an extent casting doubt upon her competency. Although she had been the owner of the Mendocino property for twenty years, her estimate of its value was much below that of others conversant with such lands, several thousands of dollars less.

As to her narrative of what transpired when she told Moxey of her purpose to present him with this valuable estate in timber lands, it is worth while to compare his version with hers. Moxey relates that they were at lunch at the Techau Tavern when she said she was going to give him the redwoods; they had been speaking about these redwoods—about the tan-bark—and she said she was going to give it to him that day, May 23, 1902; he had previously seen the land, and had gone up there at her instance in regard to cutting the tan-bark, and, she explained afterward, she wanted to see how he would like the redwoods, he meant the tan-bark. After lunch they went to the office of Mr. Delmas and had the deed made out; it was signed in that office. When he went in he asked the gentleman if he could make out a deed to some property and he said he could do so. Moxey had the description of the prop-

erty with him; he had obtained it from respondent at the Tavern. He did not remain in the office while the attorney was drawing the deed; he went out and was gone for nearly an hour; the lawyer said it would take an hour to draw it and Moxey retired from the room—respondent went out first alone and he afterward; where he went he could not remember and he did not know where she had gone in the interval. He returned, the deed was executed, and he transmitted it to Ukiah for record. Another document was drawn later on in Ukiah in the office of McNab and Hirsch. There was tan-bark cut on this land, about six hundred cords, for which he had a contract for sale, at \$17 per cord, but all of it was not delivered because it did not come up to the contract. This was on account of the trouble had with men cutting it and himself being taken away from the work through the lawsuits instituted against him by Boston parties, including an attachment levied here for \$12,000.

It would appear from this that Moxey's mind was in a receptive condition for the surprise so suddenly sprung upon him by her at luncheon, as she had some time before sent him up to the redwoods to see how he would like them; and it appears, also, from the testimony in this controversy that two days before he was so surprised he called on William Thomas, who had been the attorney for respondent, to inquire in regard to the condition and value of her Mendocino property; this was on May 21, 1902. Thomas asked Moxey what he could tell him about it, and Moxey said he would like to know what it was worth. Thomas asked him if he was a purchaser of the property or contemplated purchasing; he replied no, that he was a friend of Mrs. Phillips and wanted to handle it. Thomas told him that he did not know the value of the lands, as the matter was in charge of Mr. Smith, an attorney, clerk in the office, but that he had been assured that the tract was some of the most valuable redwoods in the state, but he could not give an exact idea as to the valuation. Moxey then asked Thomas to show him some of the papers, which he said, "I understand are in your office." Thomas asked, "What papers?" Moxey said, "I would like to see the description of the property, the map, and tax receipts." Thomas replied that before he could accede to this request he would require

an order from Mrs. Phillips and upon the production of such a memorandum he would instruct his clerk to devote all the time necessary to him. It is curious that if Moxey had no precognition of the purpose of respondent he should have been so inquisitive in advance of her declaration at the Techau Tavern luncheon. The interview between Thomas and Moxey was rather heated, because the former resented the manner of the latter's intrusion into his office, and this may, in part, account for avoiding further intercourse with that lawyer and choosing a strange attorney, for it was Moxey that conducted respondent to the office of Mr. Delmas and selected a gentleman utterly unknown to him and to her, and there caused an instrument to be prepared in such haste, that the description was so fatally defective as to render necessary a second deed before a loan could be negotiated thereon. If respondent controlled the situation and had mastery over her own volition at the time, it should seem remarkable that she would deliberately adopt a course of action in a matter of such magnitude as to consult a stranger and ignore her own legal adviser, Mr. Thomas, whose office was but a short distance further downtown, where full information and complete data were accessible, and competent advice was at hand, and where a perfect conveyance could be prepared and all the details of execution accurately adjusted; and where, moreover, she could have the advantage of independent counsel as to her action. In and by very virtue of his relation to her as his betrothed, Moxey should have seen that she was so provided where he was to be the sole beneficiary of the transaction. Their relations were of an extremely confidential character, and the law imposes in such cases the utmost circumspection and care to forefend fraud. Mr. Moxey testified that he had no knowledge of respondent's intention to donate the redwoods to him until the luncheon, and that she told him she was going to give it to him because she loved him and wanted him to have it, and they happened to go to Mr. Delmas' office because she suggested that gentleman's name and did not mention Mr. Thomas, and that she furnished a typewritten description of the land, which he never saw before, and that he knew nothing about the extent or value of the property before the deed was drawn

and had made no inquiries on this subject. In respect to this statement, his visit to and interview with Mr. Thomas may be worthy of consideration as hereinabove narrated. It cannot be doubted on this record that he had made inquiries in the quarter where information was lodged, and that his endeavors were not successful at the time. Respondent's description of the circumstances of the making of the redwoods deed is calculated to suggest that she was deficient in business sense, or so subject to the control of Moxey by reason of her infatuation for him that she was destitute for the time of ordinary powers of memory and reflection; she left the whole matter to Moxey; she did not request the deed to be made; he did that; she did not know that she said anything, he might have said that he could do the business as well as she could, perhaps better, so she got him to do it; she gave him the tax receipt; she did not know Delmas; Moxey did not ask the lawyer's name, she could not remember the notary; she was sure she went downstairs two floors to acknowledge the deed, whereas the notary's office was one flight higher; her memory was a medley upon the details of the making of the first deed; when she went out of Delmas' office while the young man was engaged in the operation she remained away for some time and upon her return she lost her way and could not find the place; she went to different floors, found it finally; she was very much confused in her recollection of these matters, and so far as appears from her recital she acted in a manner mechanically or automatically; she gave no instructions to the draftsman of the document; said nothing while in his office; Moxey did all the talking and paid the attorney for his services. Throughout all this performance Moxey was the dominant factor and principal actor—indeed the only one, as she but played the part of a puppet in his hands; and he did not wait long to realize upon this act, for within a week or two, when the imperfection of the first deed was cured, he secured a loan of \$5,000 from the Bank of Ukiah; besides which he received over \$6,000 on a contract for tan-bark, which was abandoned because after nearly four hundred cords had been delivered, the purchaser found it was not up to standard; the buyer testified that he paid some of the purchase money to Moxey and some to Hoover. Moxey testified that he spent all of the money, and

more, too, on the tan-bark, which turned out to be an unprofitable venture because of the lawsuits brought against him—that is to say, he expended more than \$11,000 on the tan-bark proposition, which would have been profitable if he were not interfered with by litigation.

Where the excess expended came from does not appear in this record. Respondent herself testified that she raised \$10,000 last year (1902) from January 1st to September 1st, all of which had been spent by the latter date, \$5,000 by her husband in cutting the tan-bark and \$5,000 she had consumed on herself, and she never gave Moxey a dollar before their marriage, which took place on the 14th of July, 1902, in the afternoon, in San Jose. It was on the morning of that day that she requested Professor Hoover to make out a deed of her property in Boston: "I told him that I wanted him to make it out for my Moxey"; she said she was going to surprise him on his wedding day; Moxey was present then and there when this surprising statement was made; this was about 10 o'clock or half-past; she could not remember exactly; "I was going to surprise him because we were going to be married that day." All she could tell Hoover about the description was the street and the height of the building and the granite front; she did not know the depth nor the width of the building; that had to go back to Boston and be filled in. After she told Hoover to draw the deed, she went down to the Nevada Bank for her mail and from there she went to the Palace and there met Moxey by appointment and had lunch with him at that hotel; after that meal they went to the office of Justin Gates, notary, where they found Mr. Hoover, according to arrangement, as she had told him when he had the deed ready to inform her at what time to meet him and she would come and sign; he had made it out, she supposed, on Monday morning, but she did not know; he made it out and she went and signed it when it was ready; in the notary's office she said, "Do not have that put on record until it is filled out; if you do it won't be legal; have it filled out before it is put on record"; she said this to Moxey; nothing else was said; she went out; was in that office but five or ten, perhaps fifteen, minutes; no writing was done except signing the deed; Hoover did not sit down and write while she was there; he did

nothing after she arrived there; the deed was ready as soon as she entered the room; she made her remark in the presence of the notary, Hoover, and Moxey; four persons in all present including herself; she could not precisely say what was omitted, but it was all of the description from the word "bounded"; all of that was blank when she signed the deed; she gave the paper to Mr. Moxey, who put it in with his papers, and he sent it back by Mr. Hoover to Boston to be recorded; the incident in the notary's office occurred after 1 o'clock, perhaps as late as 2 that day; she could not remember that the notary said anything, but she said to Mr. Hoover, "It must not go on record until it is properly filled in"; she said, "It is not legal"; he said, "It may never go on any record"; she replied, "It must go on record as soon as it is filled in"; then she went up to the house and afterward took the train for San Jose, and there met Moxey, who had preceded her to that town, and they were married.

As to the antenuptial events of the morning of the wedding day, Justin Gates, the notary, testified that Hoover came to his office and asked him if he had any warranty deeds; the notary said "Yes"; he had blanks of that kind; this was about half-past 11 or quarter to 12 o'clock. Hoover then requested the notary to remain in his office a few minutes; this was just before the lunch hour and he consented to defer luncheon until Hoover returned, which was in about ten or fifteen minutes, when he brought with him a lady and gentleman. Gates gave Hoover the form of a deed and the latter asked him if the instrument could not be executed in blank, the former said he thought it would not be legal to do so, and that some sort of description should be given, that it would not be proper to sign first and fill in the description subsequent to the execution; the lady who gave her name to the notary as Mrs. Gage H. Phillips gave the description, such as it was, that was inserted by Hoover, who wrote the matter, filling in the blank so far as she gave the material, "Lots No. 122, 124, and 126 situated on Summer street," and from that on as now written in that blank was not in there prior to execution nor was it inserted at all in his office or in his presence; the lady made no remark only in response to Hoover that she did not know the description except so far

as given; the notary was sure that the remainder of the description now there was not in that document when it was acknowledged before him; all of the written matter was inserted by Mr. Hoover then and there and it occupied him nearly fifteen minutes; the man who was with Mrs. Phillips had very little to do with the matter; he may have said a word or two and the lady was silent, except as related; Hoover transacted all of the business with the notary, and when the former proposed to first acknowledge the deed and then fill in the description, the lady made no objection to such a course; but the notary would not have it that way, as he thought it not proper. The notary presents Hoover as the foremost figure in this scene of the execution of the Boston deed, and the professor's story of the circumstances connecting him with the affair is to be considered: Mr. Hoover testified in his direct examination that he saw Mrs. Phillips on the morning of the 14th of July, 1902, in his private office, 1327 Market street, when she asked him if he could make out a deed; he said that he could, and she said, "I want you to make out a deed for me"; he asked her for a description of the property, and after she gave that to him, he told her that he was busy preparing to go east the next day, and he would rather she would have her attorney make out the deed, as he himself was very busy; she replied that her attorney had made out a deed for her and it would not stand of record; she asked him if he would not make out a deed that would stand and he did so; this talk took five or ten minutes; then she left the room; he made out the deed; and then again saw her in the office of Justin Gates, the notary, on McAllister street. When respondent asked Hoover to draw the deed she said she wanted to give it to Mr. Moxey; she said she wanted to deed this property to her husband and present him the deed that day as a wedding present and as a surprise to him, whereat Hoover smiled and she said, "We are going to be married to-day." Hoover then told her a notary was necessary to acknowledge, and consulting the directory found that the nearest one was Justin Gates, and he made an appointment for his office, 14 McAllister street, with her, and Hoover went there between 1 and half-past 1 that afternoon. When he arrived at the notarial office he found Justin Gates and

a lady who was not Mrs. Phillips. Hoover was there not more than five or ten minutes when she came in with Moxey. Hoover told the notary that those were the parties who were to acknowledge the deed, and she signed it and that was all there was to it. Gates told her that the description of the property was not completed and it should be filled in before the deed was recorded; the notary told her that two or three times and Hoover told her so once or twice. She replied that she was aware of that fact and did not want it recorded until it was properly filled in, and they would not have any further trouble over it; at the time the deed was acknowledged before Gates the description was filled down to and including the word "bounded," Hoover wrote in the blank form and that portion of the description, the remainder was inserted afterward, as she could not at that time give him the boundary lines and she cautioned him twenty times to see that it was properly filled out before recording; she did not know the boundary lines; she told him to be very sure and have every word inserted so there could be no trouble ever made with the deed, and to be very accurate and careful. After it was signed Justin Gates gave the deed to Mrs. Phillips and she handed it to Moxey, and he turned it over to Hoover, who placed it with his valuable papers—that is, Moxey's papers in the latter's office, and the next day, the 15th of July, 1902, Moxey handed it back to Hoover, asking him to have it recorded when he went East. "They" asked him if on his eastern trip he would take in Boston—he could not say which of the two made the specific inquiry—but Professor and Mrs. Moxey were both present. Hoover answered that he expected to be in Boston in two or three weeks, but he was not going direct there. He started that day, the 15th, and after visiting various places finally reached Boston. Arriving there he went up to see the property on Summer street and took an apartment opposite, about a block off, thence proceeded to the hall of records, had the stenographer take an exact copy of the deed formerly given to Mrs. Phillips, and then returned to his room and completed the description in the document he had carried from California, then took it to the courthouse and filed it for record. He received back the original

the next morning and sent it by registered mail to Professor Moxey; he did not stay long in Boston; at the request of Mrs. Moxey, he inspected the property and called on Mr. Edward Phillips and had a conversation with him about the renting of the premises on Summer street. Mrs. Moxey had told Hoover that he should go and pretend to try and rent this property, or, in other words, to investigate why her property, which was situated on such a prominent street, had not been rented for so many years—that was his reason for seeking out Edward Phillips, to whom he said that he wanted to see the vacant rooms over 122, 124, and 126 Summer street. Phillips said he would show him those over 128, 130, and 132, contiguous building, but Hoover told him he did not want these but the others. Edward said that the former was owned by his uncle, a wealthy man, and that he himself was interested in the latter. At length Hoover saw the rooms he first inquired for. He had further talk with this Edward Phillips, who evidently wanted to get rid of him, so he was impressed. He subsequently saw the same gentleman in San Francisco, at the Manhattan Hotel, and spoke with him there. Mr. Hoover testified that he had no interest in this controversy of any kind, name, or nature, financial or otherwise; had been paid nothing for his services and had no expectancy of profit or reward. When Moxey was east in the fall of 1902 he collected some money from the Krieg Company and paid it out to the workmen. After hearing respondent testify that she had spoken to him on July 12, 1902, Saturday, about making the deed, Hoover said she asked him on that day if he could make out deeds, but she did not refer to any specific property. In reference to the Boston transaction, Mr. Moxey testified that on the morning of July 14, 1902, respondent came to his room at 1327 Market street and reminded him that it was their wedding day, and said she was going to make him a wedding present of her Boston property and was going to ask Professor Hoover to make out the deed, as she was not satisfied with the Ukiah deed that was made out by the lawyer in the Call building in May; this was about 10 o'clock in the morning. They went into Hoover's office and he made out the deed; then they parted and afterward

met at the Palace Hotel, took luncheon, about half-past 12, at the noon hour, and went thence to Justin Gates' office, and as they entered the notary was opening his door to let a lady out and they found Hoover inside, who introduced them to Gates. There was a little talk about the deed, something about the description; he could not remember what for—he did not pay much attention; some dispute about the description, whether it would be legal with a part out. Moxey recalled asking her if she was willing to sign it as it was with the omission; she told the notary "yes," but she gave them to understand she did not want it to go on record that way. All this took about ten minutes; at about half-past, he imagined, they left the notary's office. She gave him the document and he handed it to Hoover. Moxey and respondent went to the street-car, where he saw her on, and himself proceeded to San Jose for a license. Moxey met respondent at the depot when she arrived in that city and they went straight to a justice of the peace, by whom the civil rite was celebrated which united them in wedlock, and subsequently, on the same evening, they returned to San Francisco, and he found the deed in his desk and on the next day gave it to Hoover, instructing him to have it recorded after being properly filled in; that was on July 15, 1902.

The circumstances of the evolution of the Boston deed call for criticisms similar to those applied to the Mendocino document. In neither case was she advised by her own adviser, and in the latter she was without the aid even of a practicing lawyer of any kind, but sought the service of a person not known to possess the skill requisite for a transaction involving real estate worth \$200,000; the alleged reason for this singular act was that the lawyer who drew the first deed made a mistake in the description, and, therefore, she desired to have so solemn a document drawn by a man who was not a professed conveyancer, and who made out an instrument more defective than the other.

It is noteworthy that each time the deeds prepared in haste were characterized by like faults fatal to their validity. It must, however, be observed here that, although Professor Hoover did not claim to be a lawyer, nor prac-

tice as such, he possessed a certificate of admission to the bar from the United States circuit court of the northern district of Illinois, Cook county, Chicago, May 5, 1898, but no record of admission in any other court; he did not undergo an examination, but was admitted on motion of a lawyer in whose office he studied, but he did not consider himself an attorney. Hoover had been graduated as physician from the International University at Chicago, but he did not claim to be a doctor of medicine; he had, however, studied law and physic, but did not hold himself out as a practitioner in either. In regard to the instrument of conveyance drawn by him at the instance of respondent, he did not act as a lawyer, but simply to accommodate that lady and comply with her request; he could not recollect where he obtained the blank form of the deed, and he wrote in the description so far as she could give it. She did not say that it would not be valid if not filled out. Hoover thought it would be legal to fill in after execution and before recording, although the notary seemed to entertain scruples about that course. Hoover started for the east on July 15, 1902, and returned between August 15th and 20th. When he met Edward Phillips in Boston he did not give any name to him, because respondent told him not to give his real name; he did not call there upon her brothers, because she told him not to reveal his identity back there, as they might not like taking the property out of their hands, as she was dissatisfied with their management; she did not tell him that her brothers had had charge of it for thirty-five years; she said they had had it for three years and had not managed it to her satisfaction. The deed was recorded July 22, 1902, two hours after Hoover arrived in that city. When he had the talk in Boston with Edward Phillips the latter asked Hoover several times what he wanted the rooms in 122-126 Summer street for, and he evaded answering until he was compelled to; he was evasive in his responses to Phillips under the instructions received from Mrs. Moxey; he said to Phillips that the rooms might be used for storing peanuts; he did not tell him that he was going into the peanut business, but he was interested in a peanut company at that time; Phillips said it was a

very strange business for that locality, but Hoover told him it was strictly wholesale and not retail, and then Phillips thought it would be all right; of course, this peanut proposition was all in the air, so far as renting the rooms was concerned; there was no such intention in Hoover's mind. When he arrived in Boston Hoover was on the lookout for something to eat, and as he went along from the station the first place he espied was a rooming-house and he entered and hired a room; as he came downstairs he encountered in the entrance a gentleman of whom he made inquiry as to the whereabouts of the City Hall and other places in the town; this person said he had met Hoover before, that he was a traveling man and had been at his place in Colorado, and it turned out in the course of conversation that the stranger belonged to two or three fraternal orders of which Hoover was a member. He gave his name as Mr. Young and volunteered to accompany him and show him around; the proffer was accepted. Young was about five feet nine inches tall, between thirty-five and forty-five years of age, reddish hair and whiskers; he weighed about ten pounds more than Hoover. Hoover is thirty-four years old, five feet eight or nine inches in height, one hundred and fifty-six pounds in weight; barefaced; sandy complexion. Young went with him to the recorder's office; he did not remember whether he gave the deed to this man to take it in or whether he took it in himself, but he was under the impression that Young was with him and both entered together; they were always together, everywhere, in Boston and Cambridge. Hoover could not remember the initials of his constant companion who went once for the deed, but it was not yet recorded. Hoover was not sure whether he sent this Mr. Young to have the deed recorded or went himself; he trusted Young, although he had just met him that day, for "he seemed like he was a very nice gentleman"; he roomed in the same house. Hoover could not remember the name or number of the street where he had taken lodgings; he could not remember whether he paid the fee for recording before or after it was done; he remembered giving some money to Young, but did not remember whether it was for the recording fees; the fee was nominal;

he could not remember whether it was in coin or paper currency; he thought he gave a gratuity to the clerk after the recording, as that was the custom of the country in the east; he was in a hurry and he usually gave a little extra fee; he had probably chucked him a half-dollar as he had done to the others. This Mr. Young wore a mustache. He had gone two or three times at request of Hoover to obtain the deed, but it was not ready, and finally they went together and obtained it; he did not remember ever to have seen this man prior to meeting him as related. Hoover swore that he never himself assumed the name of Young, or gave that to anyone as his name.

The clerk of the registry of deeds, Frank J. Glancy, deponed that he remembered a person coming into his office in Boston some time in July with reference to a deed of Mrs. Moxey; a man of about five feet ten inches, light complexioned, about one hundred and fifty pounds, heavy, athletic build. The first Glancy noticed of him he was down in the record hall; he was talking with one of the young ladies there, and she being busy sent him up to the clerk's desk and he came and he said he wanted some one to run a title for him, and then they together ran the records back until they found a deed of property situated on Summer street, which went to Gage H. Hawkes, or Gage H. Phillips. This man then started to make a copy of the description, but, thinking it would take too long, accepted the clerk's suggestion to have a typewritten copy made, and he waited for it; it was then near noon—he came in between 10 and 11 o'clock. The clerk went to his dinner at 12, and told the man, whom he left behind, that one of the other clerks would give him the copy. Glancy did not see the man again until nearly 4 o'clock that day, when he came in and gave the clerk a deed and he was told it would cost \$1.85 to record it; the man paid the fee and the clerk recorded the paper; the man asked him if he could record the deed and return it so that he could take a train to New York that night; the clerk said that the best he could do was to have it ready next day at 12 o'clock; when he took the paper this man gave his name as Young; when he came in the next day and the paper was recorded Glancy

remarked to him that there was no seal on the document, but said it could be put on then; the man put on the seal which the clerk gave him, and asked him if there was any more charge; the clerk said "No"; the man chucked him a half-dollar, and said, "Here, go and get some cigars," and taking the deed, departed. The name of the grantor in this instrument was Gage H. Hawkes, formerly Gage H. Phillips; the grantee was a Mr. Moxey, first name forgotten by the deponing clerk, Glancy.

The singular circumstance, common to the two deeds and their development, demand consideration from the court in connection with the main and controlling issue in this case, the competency of the respondent, and atone for the lack of brevity in their discussion. It must be borne in mind throughout that respondent by her acts denuded herself of every particle of property over which she had control, and placed herself entirely in the power and at the mercy of a young man, scarcely half her years, practically impecunious—certainly from his own report of slender resources and comparatively precarious prospects—with whom she had after a few days' or weeks' acquaintance become betrothed, and to whom she conveyed all her possessions, leaving herself not a modicum of her vast wealth; and all this without adequate or any advice from competent counsel or disinterested friend, and prior to her marriage. If it be said that, being betrothed to him, it was natural that she should bestow her fortune upon this youth to whom she had given her heart in troth, it may be answered that there was all the more reason for securing safeguards in the mode of transfer; for, as a learned judge has said, there is perhaps no relation in life in which more unbounded confidence is reposed than that existing between parties engaged to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life; from him she has no secrets—she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm's-length, is the acme of absurdity. If these transactions were honest in conception and execution, and not

the fruit of the conspiracy charged, common prudence should have dictated the employment of the talent and skill of an experienced conveyancer, preferably an attorney familiar with the affairs of the donor, instead of relying upon a stranger or an amateur in an art so technical. If the explanation of the respondent and Moxey be accepted that she intended the instrument as gifts to him, to whom she was engaged, ordinary sensibility and delicacy should have inspired noninterference on his part, and even the non-participation of his next friend and employer, Hoover, who was so active and industrious from the inception to the recordation of the Boston deed; but in neither of these transactions was there perceptible any such fine sense or respect for the proprieties which should govern the situation; and in the matter of the Boston conveyance, more particularly, which she stated expressly she designed as a surprise to her intended husband, and about which he had no foreknowledge, the evidence shows that he was present, and no act of hers in connection with either performance was accomplished without the power of his personality, and at least in one case, that of Boston, the active assistance of Hoover.

Inherent in these affairs are certain elements that may be considered as tending to establish the accusations of the petition. The fact that these deeds recite a false consideration, and purport to be deeds of bargain and sale, conveying the premises described therein for a pecuniary consideration, whereas none passed, is regarded by the law as a strongly suspicious circumstance; especially is this the case when regarded in connection with an alleged gift between persons holding relations mutually confidential and when the donor is suspected of mental weakness. The secrecy of the acts, so far as the persons upon whom the respondent would naturally rely for advice are concerned, is a suggestive feature. In all cases of this kind the element of secrecy is dwelt upon as affording strong ground for suspicion. The haste in which each instrument was prepared and executed; the excessiveness of the gift; the lack of opportunity for calm consideration and reflection, and want of time for deliberate perusal, in a matter so mo-

mentous, particularly as the Boston document, which she intended as a wedding gift, yet recites a money consideration and contains a covenant that she would forever warrant and defend the title she had conveyed, and would, also, furnish an abstract up to date, this latter clause written in by Hoover, the draftsman of the whole; that the grantee virtually dictated the one deed and supervised the other, which was prepared by his intimate friend and associate; his admitted influence, through her fatuous fondness for him over respondent,—all these and other elements elsewhere adverted to are discoverable in the circumstances of either one or both of these transactions; and in considering the testimony, acts and conduct of respondent and the two professors in connection with the deeds, we must have constantly in mind their relations of intimacy and confidence and the natural influence of propinquity, steadily cultivated until the end was attained, the acquisition of her entire estate by Moxey prior to the marriage.

The counsel of respondent, in commenting on the evidence, said that every act of hers was exaggerated, and mountains were made out of molehills, and he called attention to the lady herself and her conduct in court and on the stand, and her testimony exhibiting memory, will, understanding and power of concentration, reasoning capacity, coherence, clearness of explanation, tests of competency, all of which she manifested when under examination to an uncommon degree; and counsel further alluded to the characteristics of insanity or incompetency, as shown in external appearances—voice, face, eyes, motions and other phenomena, in none of which was she eccentric, or out of the orbit described for rational beings. In reference to this comprehensive claim of counsel, allusion may be made to the episode in the trial in which the name of Mrs. A. Lloyd Smith figured, and the total failure of memory on the part of respondent when first interrogated as to the matter. In answer to the question at first put to her about this person, she said she did not know a Mrs. Smith or a Mrs. Jones; there had been no allusion by the examiner to the latter name; she said she had never met a Mrs. Lloyd Smith who lived at the Palace Hotel; she did not remember going to

that place to meet a lady there; she had never been introduced as a Mrs. Gage in the Palace parlors to a lady who had oil stock for sale; she repeated that she never knew a woman by the name of Mrs. Lloyd Smith. Respondent was firm as to the fact that she never met and did not know such a person; but, subsequently, petitioner applied upon an affidavit for an order to examine upon commission to Seattle a Mrs. Lloyd Smith, said to reside there, and that person having been found, her deposition was taken and read in evidence, from which it appeared that the substance of the matter recited in the affidavit was true. Mr. Moxey was present in Seattle at the time of the taking of this deposition, and he afterward testified in this court confirming the essential features of the Smith story. After that, when respondent was recalled to the witness-stand, she said that she had not remembered when she was under examination a short time previously that she had ever met or known Mrs. Smith, but after her testimony was over for that day Moxey reminded her of the incident of meeting the woman, and then she recalled the visit to the Palace, but she could not recollect what conversation occurred; something was said about oil stocks—she could not remember what. Mrs. Smith did not impress her and she never thought of her again; she had heard her spoken of since this case began,—indeed, lately she had heard nothing but Mrs. Smith. She denied point blank that she had ever told Mrs. McWilliams or Mrs. Shipman that Mr. Moxey had spoken to her of a Mrs. Smith, a very wealthy woman, who was very much in love with him and who wanted to marry him if respondent did not do so; she did not say to either that Moxey told her that this Mrs. Smith lived in New York and was quite wealthy, and that she wanted him to marry her and take charge of her property, and that if respondent should not marry Moxey he would marry Mrs. Smith, nor did she say that she loved Moxey and did not want to lose him, nor did she say to either that she had met this Mrs. Smith at the Palace Hotel; in fact, she never mentioned the name of Mrs. Smith to either of these women.

Mrs. McWilliams testified that she had made such statements, and Mrs. Shipman made a similar statement as to what respondent communicated to her on the same subject; each of the conversations with these witnesses being independent of the other. If she had such a lapse of memory as to the main event, until her recollection was revived by Moxey, is it not reasonable to suppose that she was utterly oblivious as to her conversations with these ladies, who were not hostile witnesses, in the moral sense, and to whom there is imputed no motive for mendacity. What is the inference from this evidence as to the Lloyd Smith episode? It is quite deducible from Moxey's own statement that he was making use of Mrs. Smith for some purpose in connection with respondent. He testified that he visited the Palace and called upon Mrs. A. Lloyd Smith to have the respondent see some oil stock, although the latter says she did not want any oil stock and did not buy any stock; that she only went to the hotel because Moxey wanted her to go down. He asked her if she wanted to buy any oil stock; she told him "No," she did not care for any oil stock; then he said, "Go down and see her," and they went down, as he says, not to see the oil stock exactly, but to have Mrs. Smith speak to her about some oil stock she had for sale. Mrs. Phillips did not then know Mrs. Smith and had no apparent occasion of her own to call on her. It was Moxey that induced her to make this visit on a pretext of purchasing or inspecting stock that she did not want and had no intention of buying. Moxey did not introduce Mrs. Phillips to Mrs. Smith; on this point he was positive in his testimony. Mrs. Smith talked to respondent about the oil stock; she explained all about it; he could not remember just what was said, but the substance of it was that Mrs. Smith represented to respondent that she had some very valuable oil stock which she had just secured from somebody in Oakland, and that she would let Mrs. Dr. Turman have these shares for what she paid for them.

According to Moxey's account of this interview, these were shares of oil stock, Mrs. Smith said, that she could sell for \$12 a share immediately on arriving in New York, whither she was going, and she was anxious to have this Mrs. Dr. Turman show her ability. Moxey did not think that Mrs.

Smith said she wanted money to go east with, but it was inferred that she wanted Mrs. Turman to sell enough stock to go to New York with her. This meeting, Moxey testified, was brought about by a prearrangement between Mrs. Smith and him made on the day before; he said that Mrs. Smith was very anxious to have Mrs. Turman go east with her and Moxey could not purchase any stock at that time, but he told Mrs. Smith that he had a friend who might purchase some oil stock, as he had heard her speak of purchasing some from a party (whose name he could not recall at the time of testifying), and he would see this friend and bring her there, if she would come and see the stock; he would like Mrs. Smith to have a talk with his friend, anyway, because he did not feel that he could explain to her the matter as capably as could Mrs. Smith; so he said to the latter, and in that way the interview came about. Moxey's reason for this peculiar behavior, as given by him, was that he was anxious to aid Mrs. Dr. Turman in her ambition to go east with Mrs. Smith. He said that this lady doctor came to his room and told him that she had a friend who had some very valuable oil stock that she desired to dispose of in part, and that it was stock that would more than double itself in ten years, and she herself wanted to go east with Mrs. Smith, but before she could do so she had to sell some of this stock. Mrs. Turman said to him, "Moxey, I think it is a good thing—in fact I know it is—and Mrs. Smith is a friend of mine and she is reliable, and I would like to have you go down and see her," and he agreed to do so; and he went and had the conversation already related with Mrs. Smith, in which he arranged to bring his friend to look at the stock. Moxey repeated in his testimony that he told Mrs. Smith that he could not himself purchase any stock, but as he was anxious to help out Mrs. Dr. Turman, he had a friend who might purchase some of it, that he had heard his friend speak of buying oil stock and he had cautioned her against it, but he told Mrs. Smith that he thought she had a good proposition and he would have his lady friend come down and see her. Mrs. Smith asked him when he would come and he told her the next day; she wanted to know in advance as, most of the time, she would go around in her morning dress or "mother-

hubbard," as she called it, and she desired to be dressed for company when this lady should come. He did not ask her to wear any particular costume, but she said she would dress up something the way she was then, and he said that was all right. She was attired very nicely that day—had her jewels on. He notified her prior to going down with respondent; sent her a note of their approach.

In relation to Moxey's narrative of this episode, we must consider the account of the same rendered by Mrs. Dr. Turman, whom he introduced into it as the occasion for his visit to Mrs. Lloyd Smith. Mrs. Turman testified that she knew Mrs. Smith in the month of April, 1902, and that during that month, or in May, she had a conversation with Moxey concerning that lady who had oil stock to sell and who wanted her to handle it. This conversation with Moxey was in Hoover Hall, in the main office. Mrs. Turman told him that she had a lady friend at the Palace Hotel who was interested in stocks, and she herself thought they were good, but as she was ignorant of such matters, she would like to have him talk with this lady himself. Moxey said he had a friend who had money and would possibly buy, and he would bring this lady and introduce her to the other; he did not mention the name at the time. Mrs. Turman then arranged to introduce him first to Mrs. Smith, which was done, and they had two meetings before his friend was brought forward a day or two later. In the first interview when Moxey was introduced to Mrs. Smith at the Palace he said he had a friend who might buy oil stock and that he would like to bring down the following day. After that initial interview Mrs. Turman had another talk with Moxey and another after his lady friend had called at the Palace and had seen Mrs. Smith; the talk was with regard to this lady; she asked him what her name was and he said it was Mrs. Gage; he did not tell her it was Mrs. Phillips. At still another talk Mrs. Turman asked Professor Moxey if this lady was going to buy the stock and he answered "No"; that her lawyer advised her against it. Several weeks later on, some time in the early part of June, 1902, another talk was had with him and Mrs. Turman said to Moxey, "Pro-

fessor, why this was Mrs. Phillips that you took to the Palace Hotel." Mrs. Turman had seen the name on a postal card that Moxey handed her to read. Moxey laughingly said the postal card was something regarding some property and he would have more than that, or something in a boyish way, Mrs. Turman did not remember the words exactly; he admitted that it was Mrs. Phillips and when asked why he did not say so in the first place, he just laughed. Prior to his lady friend going down to the Palace, Moxey told Mrs. Turman to ask Mrs. Smith to wear her finest dress and to make the best appearance possible, and also to make it appear to his lady friend that she wanted him to travel east with her as a business man, and Mrs. Turman asked him why he wanted Mrs. Smith to do that, and he replied that he simply wanted to make an impression upon this elderly lady, this Mrs. Gage, he wanted to make her a little jealous, or something of that sort, in substance, was what he said. Professor Moxey denied in toto that he had ever told Mrs. Dr. Turman that he had taken Mrs. Phillips to see Mrs. Smith, or that he ever made any communication to her concerning his business.

This episodic phase of the controversy as to the competency of respondent may be closed with a summary of the testimony of Mrs. A. Lloyd Smith, who was the central figure in the proceedings for a brief space. Mrs. Adelaide Lloyd Smith called San Francisco her home, when she deposed at Seattle, where she was found with her trunk packed ready to go east; she was not living anywhere then, but traveling, and just then staying in the northern city, detained on account of the deposition. Mrs. Smith said that she had stopped at the Palace Hotel in April and May, 1902, for about four weeks, and she had met Mrs. Moxey there on the 12th or 14th of April; it was from the 10th to the 15th, between these last dates in 1902; she was introduced by Mrs. Dr. Turman; it was Easter morning and Mrs. Smith had not met Dr. Turman for about a year or a year and a half. Mrs. Smith told the doctor that she intended to go east and was waiting to obtain the services of some one to accompany her as secretary and business manager, and Dr.

Turman said she would like to act in that capacity, but she did not have the means to procure an outfit, and Mrs. Smith offered to obtain some stocks for her to sell and thus raise the wherewithal; and she then secured stocks at a certain figure and told Dr. Turman to make the effort to sell on a commission; the latter said she would bring some people to see her in the evening, and she brought some three or four persons, among them a gentleman whom she introduced as Professor Moxey; she did not bring him; she was waiting for him and he came there by her appointment; this was in the Palace parlor; the first time was in the evening at about 9 o'clock; he was introduced by her and she asked Mrs. Smith to tell him about different investments in which she was interested; he seemed pleased with them, but said he did not have any money to invest just then, but he might have some friends who would be willing. Mrs. Smith told him that there would be a commission in it for him, and he said he did not want any, as he was doing this for Mrs. Turman's sake, so she could go east with her; then Mrs. Turman said in case that she could not go, in a joking way, it would be nice to have Professor Moxey as her business manager. Mrs. Turman said that he was a very good business man and would be a great help; that he was an honest man, she knew him and she worked in his school—in fact, she gave him a very high recommendation. Moxey was present but made no remark on this point; he said that he would call again and bring a lady and would let her know in advance at what hour; he then bade "good evening" and went away. On the following morning, when she arose, Mrs. Smith found a note under her door—it was written in lead pencil—from Mr. Moxey, in effect saying that he would bring a lady at 3 o'clock that afternoon to see her, and telling Mrs. Smith to wear her prettiest gown and all her diamonds, and particularly to praise him for his business ability; this note was signed, "Yours, Moxey," which was rather peculiar, as she had never met him before the previous evening; on account of this singular subscription from a stranger she laughed about it and showed it to Mrs. Turman, who came in shortly afterward while she was dressing. Mrs. Smith did not preserve this missive from Mr. Moxey; she destroyed it after showing it to Mrs. Turman and

to her own lawyer and commenting on the oddity of the ending from a man whom she had never met, except as stated. Subsequently, and on the same day, and before he brought this lady to the hotel, some one knocked at her door, while she was combing her hair, and when she opened the door Moxey was standing there in his bicycle suit; he had knickerbockers on, and he said he just ran up for a few minutes to explain about the note; he said that the reason why he asked her to wear her prettiest gown and all her diamonds and to praise him was that this lady friend had \$10,000 to invest, and he wanted this lady to realize that Mrs. Smith was a woman of wealth, so that his friend would be more favorably impressed, and he also desired that she should say that she would be pleased to have his services as her secretary and business manager when she went east; and that she thought highly of his ability. Mrs. Smith made him this promise. Professor Moxey, in his testimony, denied that, upon this occasion, he wore a bicycle suit or knickerbockers; he says he had on his ordinary dress.

In the afternoon, at about 3 o'clock, Moxey came again and brought a lady with him, whom he introduced to her as Mrs. Gage. Mrs. Smith never saw the person before nor after, and he said that he wanted her to speak to Mrs. Gage about any investment that she might have to make as she had some money to invest. Mrs. Gage, as Moxey called her at the time, was present when this remark was made; then he sat down to one side and did not have any more to say during the interview, and Mrs. Smith says she proceeded to present the proposition for investment, and this Mrs. Gage said she would consider the matter and would let her know the next day whether she would invest or not, and then she said she would rely upon Mr. Moxey's advice, because she thought he was a fine business man and that he had good judgment. Mrs. Gage uttered this compliment herself, to which Mrs. Smith responded, "Yes," and that she herself would be very glad to engage Mr. Moxey's services as her own business adviser, as she thought that he was honest and energetic, which he did seem to her to be, and to that extent she spoke in good faith; and she added that she would be pleased to have him go east with her in that capacity, and Mrs. Smith turned to Mr.

she retained. As to her power of concentration, it seems that although Mrs. Smith dilated upon oil stocks, with a view to interesting her, for the space of about forty minutes, respondent could not recall what it was all about, and was not impressed and never thought again of the subject, or of its voluble expositor; she did not understand it, could not reason about it; nor was she able even under tutelage to make any coherent or clear explanation of the affair; the whole matter was a muddle to her; and yet it was an incident of importance that must have made a profound impression at the time and had left a durable mark upon her memory, if she possessed the attributes and qualities of mind claimed for her by counsel.

The marriage of respondent to Moxey followed hard upon the execution of the Boston deed; with all her worldly goods she him endowed before the knot was tied, and they hied them, each separately, to a country town fifty miles from their legal residence to be married by a squire in presence of witnesses who were strangers to them. When they returned they spent the night at his room in the Hoover hall. She swears they began to live together on the first night of the marriage, July 14, 1902; that a few days after their marriage her husband and she went to the Manhattan Hotel, on Market street, and remained there until October 1, 1902, when they went east; they went to the hotel August 1st, and between the date of marriage and that day, the 1st of August, she used to go down to her husband's room at the Hoover hall, and they lived continuously together except while he was at the redwoods. During the time that she testifies she was cohabiting with him the record shows that she was ostensibly living in July, 1902, at the Pendleton private hotel, and beginning with August 1, 1902, at the Manhattan, at each place known by the name of Mrs. Phillips, and at the latter registering in her own hand, "Mrs. Gage Phillips, Boston, Mass.," assigned to room 103-B, the latter letter meaning "breakfast," and the proprietor testified that two or three weeks later she interpolated "Moxey" above the name "Phillips." Moxey never boarded during this period in the house, nor registered there, nor spent a night there as a guest, unless he did so unknown to the proprietor, but he took his meals at the St. Nicholas and roomed at the Hoover hall, across the street, opposite the hotel, and she did

not accompany him to his meals there, although he says that they ate together sometimes in restaurants.

Moxey swore that during the whole of the time after their marriage while he was stopping at the Manhattan he stayed there with her, slept there, but did not eat there; he did not register, nor state to the hotel people that he was occupying a room there, nor speak to anyone in that hotel; he would go in there after class hours, about 10 o'clock, or later, and leave at 8 or 9 in the morning. She was not known by any other name than Phillips at the hotel nor at the Hoover hall, nor anywhere else, nor did he live with her where it was openly known that she was his wife, nor did he publicly acknowledge her as such, prior to the institution of these proceedings, when he was forced to come out into the open; before that only Hoover knew of the fact and, perhaps, one or two others; he could not name one other with certainty. How long this secrecy would have continued we may conjecture. He had all her available property and her good name was in his keeping, which he was, by his furtive visits to her sleeping apartment after nightfall, emerging therefrom each morning, endangering, while he was indefinitely postponing the publication of her lawful relations to him.

Marriage is in itself such an honorable institution that the chief magistrate of this republic denounces the man or woman who deliberately avoids it as a criminal against the race, who should be an object of contemptuous abhorrence by all healthy people. Why, then, should Moxey, the man, subject this respondent, the woman, who had given everything of value she possessed, to the reproach of clandestinely contracting and then conniving at the concealment of so sacred an obligation and so dignified a relation? Was it not due to her name and fame, to every sentiment of honor and sense of propriety, that it should be made known at once and universally? The first person, and the only person, to whom it was revealed was Hoover. Not one of the other familiar friends of respondent was informed of it until the exposure of the lawsuit. No sound reason has been given for the secrecy characterizing this marriage. Naturally, the woman, if free to exert her will, would be proud to proclaim her change of status, if it were true, as asserted in this case, that it was a love match.

But respondent says that she did not make public the fact of her marriage, but kept it a secret for some time, and that as late as the last of July, 1902, she went down to San Jose to look into the records of marriage licenses; her cousin was with her, but she had not told that lady of the marriage, making the trip on some other pretense. Why she wanted to inspect the license, unless she distrusted the legality of the ceremony, is not clearly explained, for she testified that she saw the marriage license on the day of marriage and had told Mr. Moxey that her place of residence was Los Angeles; that it did not make any difference what part of California was put down, as she lived everywhere, and he might as well insert the southern city as any other; which, considering the migratory habits of the lady, was a correct statement of her domiciliary status, from her point of view; but it does not satisfy the mind of the investigator who has a right to know why these persons of lawful age, free from parental control or surveillance, should run away from where they were well known, and where the husband, at least, had a legal domicile, and engage clandestinely in marriage. If he were honest in his intentions and faithful in his purpose, and reciprocated her ardent avowals of affection, why did he shirk and shun publicity and go covertly to the country to consummate the contract? Why did he not voluntarily and before the compulsion of litigation extorted his secret, and in sight of men and women, acknowledge this lady to be his true wife of whom he would never feel ashamed? She had surrendered herself in body, soul and estate, had given into his hands and power her life and fortune and honor, and he professed to love her, and had described their engagement as a love match, as a match founded upon love into which convenience or money considerations do not enter, accepting as his own the dictionary definition, and asserting that he had no selfish or sordid sentiment and that his wife was similarly attached to him. This chivalric claim on his part is somewhat salted by the circumstances of the case at the time of the marriage, for then he had acquired all her material wealth, so far as it was subject to her disposition, and she was poor, except in the abundance of his plighted love, in which there was no taint of meanness or base alloy. His own conduct, however,

casts some doubt upon his assertion of unselfish devotion to his bride, and gives countenance to the charge that the marriage was mercenary on his part, and the ceremony contrived as a clincher to secure his hold upon the fortune he had by artful and crafty devices secured from her.

Such marriages are abhorred in equity, and not favored otherwise where the surroundings point to an unworthy motive and the conduct of the party who is pecuniarily benefited suggests insincerity or bad faith, and indicate that he has taken an undue advantage of the other's weakness of will or confidence in him, springing from intimacy of relation.

Censorious comment in a judicial opinion is deprecable, unless the censure is called for imperatively by the facts, and when so demanded no court should refuse to respond to the challenge of its duty and impress its stamp of condemnation upon the conduct of the male party to this marriage in subjecting the female, whom he said he loved, to the hazard she ran while receiving him privily in her bedroom in a hotel where she was registered and known as a single woman. The respondent, always anxious, apparently, to shield her beloved, says that he did not eat at the Manhattan because he did not like the proprietor; but he came there to sleep. Why he did not like the proprietor does not appear; but it might be surmised if the worthy boniface found him slipping out of her room in the morning, his dislike would have been intensified. If his motive were not mercenary and merely to fasten his grip upon her wealth by keeping her mind and will in servient subjection until he should have completely accomplished his purpose of acquisition, why did he live this life of duplicity and deception and impose upon her, whom he had promised to love, cherish and protect, the ignominy and humiliation of being suspected as a wanton or detected as a deceiver. She was an honest woman, and obeying her impulse, if she had had control of her will, could never have submitted to this condition of concealment and deception; but "because she loved him" and confided in him absolutely, she was prevailed upon to act a lie every day until the climax came. On his part every legitimate inducement would seem to spur him to immediate announcement of an event so fraught with his own welfare and her happiness; an event which ex-

alted him from the depression of poverty to the height of opulence; which rescued him from the hard necessity of trudging about the country seeking employment, as had been his wont, and elevated him to a plane of power and wealth—no longer a hireling but a master. It is unaccountable, upon any rational and honest hypothesis, why this man acted in this manner; but he admits that he did keep the marriage a secret, and she says, "I did not tell a soul, not a person, not even my own cousin, of the marriage." This cousin was Mrs. Hamilton, with whom, as has been seen, she went to San Jose to search the marriage license records, about two weeks after the event, and to whom she made no communication of the real object of her journey, but led her to believe she was still a single woman. In reality, it may be safely said that these parties did not from the first cohabit as man and wife. While they may have been ceremonially united, they failed to follow up that rite by living together as husband and wife and affording public evidence of that relation.

This was their duty to themselves and their obligation to the State. So far as the immediate interest involved is concerned, it matters little compared with the interests of organized society; for marriage is more than a contract—it is a status; it is an institution of society and its foundation; it does not come from society, but contrariwise; it is the parent of society, and it is supremely important that its stability shall be secured, and that its contraction should be surrounded with safeguards and its sanctity upheld; and every solemnization of marriage should be in the face of the public; there should be no secrecy either in ceremony or in connubiation; and, in this case, there is no excuse, morally or legally, for a variation from the rule thus stated and approved by the courts of this land and every civilized country. The paltry subterfuge that this young husband did not eat with his elderly wife at the Manhattan Hotel because the keeper was obnoxious may have deceived the simple soul of the trusting spouse, but it cannot be accepted as sufficient by anyone less credulous and confiding. Moxey says that he frequently took meals at the Palace with her and that they both liked the living at that hotel. Why, then, did he not take up his abode there with her? Certainly the tariff was not beyond

his income as derived from her bounty, and the associations were presumably as agreeable as at any of the other hotels and boarding-houses where she and he were sojourning. It is no strained inference to conclude that he had no serious intention of permanent cohabitation with respondent.

In attempting to account for the transfer of her property to Moxey, it is argued that, in addition to her affection for him, she was alienated from her daughter because of the latter's conduct, and that the disposition of this only child is shown to be unfilial and to justify her mother's action; that this unnatural trait is exhibited in the deposition of the daughter taken in Boston, containing reflections upon her mother. It is true that the mother's lack of judgment and the fact that she was always considered peculiar and odd about home, and the incident of an apparent attempt at suicide, when the daughter was a child of six—that is, about twenty-one years ago—at the time the respondent threw herself out of her carriage on the Floating bridge into the river, when the coachman pulled her out by the hair of her head, and the visits to the sanitarium, where her mother was confined for five years, and certain instances of improvident and aimless purchases, and other incidents manifesting strange caprices and inconsistencies and eccentric conduct at meals, which in a woman of almost abstemious habits were hard to reconcile with reason, are dwelt upon in the deposition, yet there is nothing intemperate in the recital of the deponent, and no adequate warrant for accusing her of unnatural feelings or of malice toward her mother. So far as her agency in the promotion of this proceeding is concerned, this court conceives that it was her bounden duty, for her own sake and that of her child, to set on foot an investigation as to the facts in the case and the condition of her mother's mind and the character of the people constituting her environment when she parted with all her possessions and married the man who had previously absorbed her property.

In the course of her testimony the respondent stated that it was not through love or care for her that this inquest was instituted, but that the object was simply to secure her property for the ultimate benefit and enjoyment of her daughter, as her sole heir. If the daughter were actuated alone by a motive

of self-interest, it was her duty to protect her expectant patrimony from waste or spoliation through her mother's imbecility, or through the fraud of a stranger who had obtruded into her heritage; this was her duty to her own child; but, moreover, it was her duty to her mother herself to save her from the consequences of what she had reason to believe was a conspiracy of irresponsible and unconscionable knaves. Whether she was just in her suspicions or not, is not to the purpose; she may have proceeded upon false or insufficient premises; but, apart from any sentimental considerations, it was her imperative obligation, devolved upon her by nature and by law, to prosecute this investigation and by every legal means to ferret out the facts and establish the truth. Respondent's attitude of antagonism toward her daughter is a matter of recent revelation and based upon an assumption that the latter has been guilty of acts and utterances manifesting unfilial feeling and selfish design, which imputations are not supported by the record; but the correspondent with her child shows that the mother had until very lately not harbored such delusion.

Respondent in her letters to her daughter expressed herself in an affectionate strain toward both the son in law, Mandeville, and his wife, whose former husband was not then so well regarded as now by the mother in law. These letters may be read in connection with the testimony of respondent, and tend to sustain the theory that her present state of mind was either the result of a delusion developed after this controversy began, or she consciously falsified in her explanation of her feelings toward her daughter, and that this was due to the malign influence unduly exercised over her mind by Moxey; and it is, in itself, evidence of mental weakness. It appears that, prior to these proceedings, she had entertained strong sentiments of regard for Mandeville and wife, and no great liking for the latter's first husband, which is shown by an extract from one of those letters, in which she advises her daughter of her fear that Fred Olsson might kill Harry in case they attempted to secure the child Thorwell, the son of the first marriage, from him. Respondent in this letter says to her daughter: "You and Harry live for each other; you have a pretty little home and Harry loves you. Now live

for yourself and Harry." In view of this evidence of interest and affection, respondent's present animosity is not to be treated as her spontaneous thought, much less her rational judgment, but is the offspring and echo of some one interested in estranging mother and child. According to the authorities, sudden and groundless suspicion of the affection and fidelity of tried and trusted relatives and friends is a common symptom of unsoundness of mind; and so, too, are hastily conceived affections for and confidences in mere strangers and newly made acquaintances. These remarks apply to this case.

As to these newly made acquaintances, counsel for respondent remarks that the conduct of Hoover with regard to the Boston deed was fair and open, and that the transaction in the notary's office was above board. It seems to this court that the testimony of the notary bears all the earmarks and indicia of truth, and his recital of the occurrences in his office is credible. Professor Hoover did not impress the court as a frank and candid narrator of incidents and events in which he was so intimately concerned as to call for the utmost fairness and openness. The court has no concern with his career, except as it is connected with this case, but his failure to recollect at first so important a matter as how he came to be admitted to the bar and his confusion of memory or knowledge as to state and federal courts in the place of his admission, and the obscurity surrounding that incident in his life, occurring so recently as May 5, 1898, which took place without any previous examination as to qualifications in any court is, to say the least, remarkable in a man holding so many degrees and diplomas which should import the possession of understanding and memory more than is allotted to common mortals; but his testimony generally was not characterized by candor, nor by ordinary powers of recollection.

His own account of the fabrication of the Boston deed is neither clear nor consistent with itself, nor with the statements of the others connected with it; it is in utter and irreconcilable conflict with the account of the notary, who took the acknowledgment, as to what occurred in that office. Although Hoover secured a blank from Gates, he does not remember where he obtained it; he does not know why he obtained a warranty deed; he failed totally to recall where he wrote out the deed,

The notary testified that it was filled in his presence in that office by Hoover.

Other items might be cited to show that he was either evasive in his recital or infirm in his memory. He was effusive in his comment upon the competency of respondent, who was one of the brightest women he ever knew, and thoroughly competent, in his opinion, yet he says she told him twenty times, at least, on the morning after the execution of the instrument, and in the notary's presence, to be sure and fill out the deed before placing it on record. He dwells upon the frequency of this admonition, as if it were proof of her great intelligence; but there is an incident to be explained at this point: The deed was executed on July 14th, at about noon. Moxey gave Hoover the instrument and he says he placed it among that person's papers; but on that very evening Hoover was to take the train for the east; he said he had been preparing to go ever since November, 1901, but he was not ready until this date; he missed the train; whether or not he had the deed in his pocket which she had admonished him about he does not say; but he succeeded in starting next day, the 15th, with fresh cautions from her not to forget to fill it out before recording and to adopt an assumed name in Boston. The story of Hoover's adventures in Boston, as told by himself, is sufficient to show that he has no high estimation of the virtue of veracity; it was not, as counsel for respondent argues, fair and open; it was all through the reverse; it was disingenuous and deceitful; and his own statements on the stand impressed the court unfavorably as to his candor and directness. He admits that he was evasive and equivocating in his conversation with Phillips, the nephew of respondent; he evaded giving any name to him, and told a falsehood as to the purpose for which he pretended to want the Summer street stores; he gave a false name to the clerk, Glancy, in the recorder's office; he hid himself in a by-street to keep out of view of respondent's relatives; in his evidence he invents a man named "Young," who was his guide around the city of Boston, and whose description in almost every respect corresponds to his own—his counterpart or double, as it were. Glancy described the man, who gave him the paper and took it away, to fit Hoover, and he says there was only one man,

and he gave the name of Young; as to this there can be no doubt that Hoover prevaricated in his testimony. Hoover disclaims interest in this case, yet his activity is abnormal in assisting the cause of his pupil teacher Moxey, and it is undeniable from the inception of the Boston deed, whatever doubt charity may suggest as to his connection with the Mendocino matter. In the subsequent proceedings, if he was interested no more than he declares, then he was gratuitously part and parcel of the entire scheme from beginning to end.

Many minor matters might be alluded to, to connect Hoover and Moxey with the common design to fleece respondent and to demonstrate that they were acting in concert, but this opinion has attained to dimensions that call for curtailment, necessary as it has been to deal in detail with the more important features of the case.

There is but one topic left, and that is what is usually termed opinion evidence, the least worthy, in the estimation of those who are engaged in the examination of witnesses and who are charged with the duty of weighing and determining their testimony, of any species of proof. The counsel for respondent claims credit for the class of witnesses produced by her, intelligent and responsible citizens, such as Val. Schmidt, Henry Boyle, Mrs. Pendleton, George A. Woolrich, banker; Adolph Hirschman, jeweler; Mrs. Irene D. Reeves, and others of equally high character, all of whom agree in their conclusion as to her competency; and counsel contrasts these ladies and gentlemen with the astrologers, palmists, fortune-tellers, bellboys and other local habitants who had testified to peculiarities and acts of this lady which to them signified incompetency. Of course not all of the witnesses who testified that they thought respondent was incompetent were subject to this invidious and diminishing discrimination, for some were quite up to the standard raised by counsel, such as Mr. Carothers, of Ukiah, a lawyer of good standing, and long and intimately acquainted with respondent, knowing her professionally and socially for years; Mr. Horr, of the same place, and others here and there whose observations and opinions are entitled to equal consideration with the very worthy persons named; but no matter how numerous on either

side such witnesses may be, experience teaches this court they may be produced by the score for and against the issue. all honestly testifying to contrary impressions concerning the same person whose competency is in question, they cannot change the facts brought out in the course of this long and complex controversy. Such opinions courts receive in evidence and may be taken into consideration, but they are not entitled to as much weight as facts, especially where there is a conflict between them, for when a fact is established it is a fact and cannot be overcome, while an opinion is but an opinion, and it may be true or false in its inference; and, as we have seen by the testimony of this class of witnesses, their opinions are often diametrically opposed even when based upon the same premises; and so to introduce a witness here to give an opinion that respondent is competent, and to ask the court to accept it as against the conduct of that lady, is to make too violent a demand of one whose duty it is to decide according to law and facts and not substitute for his judgment the opinion of any other person, however intelligent or honest in intent.

The claim in this case is that the respondent is incompetent; that she is incapable of taking care of herself and her property, and likely to be imposed upon by artful and designing persons, and that claim is, in the judgment of this court, fully made out.

Petition granted.

FINDINGS.

The above-entitled cause, having been regularly tried before the court, sitting without a jury, no jury having been demanded by either of the parties thereto, upon the verified petition of Harry Lester Mandeville, hereinafter designated as the plaintiff, for the appointment of a guardian of the person and estate of the above-named Gage H. Phillips, also known as Gage H. Moxey, as an incompetent person, hereinafter designated as the defendant, and upon the answer of said defendant to said petition, the said plaintiff appearing by his counsel, Messrs. Bishop, Wheeler & Hoefler, L. M. Hoefler, William Rix, E. M. Rea and C. W. Cobb, and the said defendant having been produced at the said trial and hearing and

having appeared personally, and by her counsel, Messrs. Truman and Oliver and S. V. Costello, and the court having heard the said amended petition and said answer thereto, as well as all the evidence introduced by the said plaintiff and defendant, respectively, in said cause, and the arguments of their counsel, and having duly considered the said amended petition and answer and the said evidence and arguments, and being fully advised in the premises, now here makes and files its findings of fact, conclusions of law and decision in writing in said cause as follows:

FINDINGS OF FACT.

The said court finds the facts in said cause to be:

1. That the said plaintiff, Harry Lester Mandeville, is the son in law of the said defendant, Gage H. Phillips, also known as Gage H. Moxey.

2. That the said defendant, Gage H. Phillips, also known as Gage H. Moxey, is, and at all the times mentioned in these findings was an incompetent person, over the age of fifty-six (56) years, and residing at and in the city and county of San Francisco, and mentally incompetent to manage her property, and incapable of taking care of herself and of managing her property, and is, and at all of said times was, by reason of disease and weakness of mind, unable unassisted to properly manage and care for herself or her property, and that, by reason thereof, she, the said defendant, Gage H. Phillips, also known as Gage H. Moxey, would be, and at all the times aforesaid was, and now is, likely to be deceived and imposed upon by artful and designing persons, and in truth has been deceived and imposed upon by artful and designing persons as in findings 3, 4, 5, 6 and 7 herein more particularly set forth.

3. That some time prior to the month of May, 1902, the said defendant being then the owner in her own right of certain real property situated in the county of Mendocino, in the state of California, consisting of about two thousand four hundred (2,400) acres of redwood timber, worth about twenty-four thousand dollars (\$24,000); and also of a parcel of land in the city of Boston, in the state of Massachusetts, upon which was erected a four-story granite front store, and

known as Nos. 122, 124 and 126 on Summer street, Boston, of the value of two hundred thousand (\$200,000) dollars, was residing in the city and county of San Francisco in said state of California, as an unmarried woman, being the divorced wife of one Harrison F. Hawkes.

4. That at the time last aforesaid, to wit, some time prior to the month of May, 1902, one John D. Hoover, was conducting in the said city and county of San Francisco, the Hoover University of Physical Culture, and had in his employ one Oliver N. Moxey, an unmarried man of the age of twenty-nine (29) years, or thereabouts; that the said Hoover and the said Moxey then and there conducted classes for the teaching of physical culture in said city and county of San Francisco, in the university aforesaid, and were professors thereof, teaching pupils therein, and that the said defendant at said time last mentioned, to wit, some time prior to the month of May, 1902, began to take lessons in physical culture in the said Hoover University of Physical Culture, and thereby then and there met and formed the acquaintance of the said John D. Hoover and the said Oliver N. Moxey.

5. That the said John D. Hoover and the said Oliver N. Moxey, after the said defendant had formed their acquaintance as aforesaid, learning of her (the defendant's) mental weakness aforesaid, and learning also that she (the said defendant) was possessed of large means and was the owner of the real property in finding 3 herein described, with the design and intent of deceiving and imposing upon the said defendant and of acquiring her (the said defendant's) real property, and of defrauding her out of the same, and intriguing, contriving and designing to take undue and unlawful advantage of the said mental weakness of the said defendant, and to defraud her (the said defendant) out of her said property, as aforesaid, confederated and combined together to effect their said purpose, and in carrying out their said scheme and design proceeded as follows, to wit: That it was agreed upon between them, the said John D. Hoover and the said Oliver N. Moxey, that the said Oliver N. Moxey should pretend to pay his attention to the said defendant with the view of marriage, and that he, the said Oliver N. Moxey, should induce her, the said defendant, to voluntarily convey to him, the said

Oliver N. Moxey, as a gift, the real property aforesaid; that, thereafter, to wit, on or about the twenty-third day of May, 1902, the said Oliver N. Moxey, having become engaged to marry the said defendant, induced and persuaded her, the said defendant, to deed over to him, the said Oliver N. Moxey, without consideration, the said real property situated in Mendocino county, California, as in finding 3 herein set forth, and thereupon and on the said twenty-third day of May, 1902, he, the said Oliver N. Moxey, caused to be prepared a certain deed of that date, conveying to him, the said Oliver N. Moxey, the said last-mentioned property for the purported consideration of ten dollars (\$10), gold coin of the United States; that in fact no money or other good or valuable consideration whatever passed from the said Oliver N. Moxey to the said defendant; that the said defendant, acting under the influence and control of the said John D. Hoover and the said Oliver N. Moxey, and not otherwise, then and there signed and acknowledged said deed of said last-mentioned premises; that thereupon the said Oliver N. Moxey caused said deed to be recorded in the office of the county recorder of said Mendocino county, and thereafter exercised full control over the said property so conveyed to him by said deed, and shortly thereafter mortgaged the same for the sum of five thousand dollars (\$5,000), gold coin of the United States, which he, the said Oliver N. Moxey, appropriated to his own uses; that thereafter, in further pursuance of said scheme and conspiracy to defraud the said defendant, the said John D. Hoover, confederating and combining with the said Moxey as aforesaid, prepared in his, the said John D. Hoover's, own hand a deed of said Boston property, described in said finding 3, purporting to convey said last-mentioned property from the said defendant to the said Oliver N. Moxey, in consideration of the sum of twenty dollars (\$20), in gold coin of the United States, but, in truth, no good or valuable consideration whatever passed from the said Oliver N. Moxey to the said defendant; that with the said deed so prepared by the said John D. Hoover, he, the said John D. Hoover, accompanied the said Oliver N. Moxey and the said defendant to the office of a notary public at and in the said city and county of San Francisco, and thereupon the said defendant, acting under the

influence and control of the said John D. Hoover and the said Oliver N. Moxey, and not otherwise, signed and acknowledged said last-mentioned deed to said Boston property, and delivered to said John D. Hoover the said deed so signed and acknowledged; that thereafter on the same day, the said Oliver N. Moxey accompanied the said defendant to the city of San Jose in said state of California, and was then and there married before a justice of the peace in said city of San Jose, solely with the intent on the part of the said Oliver N. Moxey, acting in conjunction with the said John D. Hoover, of perfecting the scheme, plan and design theretofore formed between the said Oliver N. Moxey and the said John D. Hoover for the purpose of obtaining the property of the said defendant, described in said finding 3, and of defrauding her, the said defendant, of her said property as aforesaid, which said property constituted the entire property of said defendant subject to her control; that after the marriage aforesaid, the said John D. Hoover took said last-mentioned deed to the said city of Boston and caused the same to be there recorded in the public records.

6. That at all times after the said defendant formed the acquaintance of the said John D. Hoover and the said Oliver N. Moxey, as heretofore in these findings set forth, the said John D. Hoover actively promoted the pretended suit of the said Oliver N. Moxey for the hand of the said defendant by impressing upon her, the said defendant, the great love and affection which the said Oliver N. Moxey professed for her, the said defendant and in furtherance of the conspiracy, and to carry out the design and purpose of the said John D. Hoover and the said Oliver N. Moxey, heretofore in these findings set forth, they, the said John D. Hoover and the said Oliver N. Moxey sought to impress upon the mind of the said defendant the great advantages to her, the said defendant, of a marriage with the said Oliver N. Moxey.

7. That all the conduct of the said John D. Hoover and the said Oliver N. Moxey in bringing about the marriage in finding 5 herein referred to, and in inducing the said defendant to sign the deeds heretofore in these findings mentioned, was for the purpose of deceiving and imposing upon the de-

fendant, and of defrauding her, the said defendant, of the said real property in finding 3 herein described.

8. That the said defendant is still the lawful owner of all the real property in finding 3 herein described, and that the said property needs the care and attention of some fit and proper person, and that proper proceedings and suits ought to be commenced for the cancellation of the deeds mentioned in said finding 3, and for the quieting of said defendant's title to said property.

9. That it is necessary that a guardian of the person and estate of the said defendant should be appointed.

10. That the said defendant has one child, to wit, a daughter named Alice Mandeville, who is the wife of the said Harry Lester Mandeville, the plaintiff herein.

CONCLUSION OF LAW.

And the court finds as a conclusion of law from the foregoing facts:

1. That the prayer of the amended petition herein for the appointment of a fit and proper person as guardian of the person and estate of the said defendant, Gage H. Phillips, also known as Gage H. Moxey, should be, and the same is hereby, granted.

DECREE AND ORDER APPOINTING GUARDIAN.

The above-entitled cause, having been regularly tried before the court, sitting without a jury, no jury having been demanded by either of the parties to said cause, upon the verified amended petition of Harry Lester Mandeville for the appointment of a guardian of the person and estate of Gage H. Phillips, also known as Gage H. Moxey, therein alleged to be an incompetent person, and upon the answer of the said Gage H. Phillips, also known as Gage H. Moxey, to said amended petition, the said Harry Lester Mandeville, petitioner herein, appearing by his attorneys and counsel, Messrs. Bishop, Wheeler & Hoefler, L. M. Hoefler, William Rix, E. M. Rea and C. W. Cobb, and the said Gage H. Phillips, also known as Gage H. Moxey, the alleged incompetent aforesaid, having been produced at the hearing and trial and having appeared personally, and by her attorneys and counsel, Messrs. Truman

and Oliver and S. V. Costello, and the court having heard the said amended petition and said answer thereto, and the evidence produced by the said petitioner and the said alleged incompetent, as well as the arguments of their respective counsel, and having duly considered the same, and being fully advised in the premises, thereupon made and filed its findings of fact, conclusions of law and decision herein, in writing, in favor of the said petitioner and against the said alleged incompetent, and it appearing to the satisfaction of the court that all the averments of the said amended petition are true, and that petitioner is entitled to the relief prayed therein:

Now, therefore, it is by the court hereby ordered, adjudged and decreed that the said alleged incompetent, Gage H. Phillips, also known as Gage H. Moxey, is, and at all the times mentioned in the amended petition aforesaid was, an incompetent person, and at all of said times was mentally incompetent to manage her property, and incapable of taking care of herself and managing her property, and that by reason of disease and weakness of mind the said Gage H. Phillips, also known as Gage H. Moxey, is, and at all the times aforesaid was, unable unassisted to properly manage and care for herself and her property, and by reason thereof would be, and at all of the said times was, and now is, likely to be deceived and imposed upon by artful and designing persons, and, in truth, has been deceived and imposed upon by artful and designing persons, as in said amended petition set forth; and it is by the court further hereby ordered, adjudged and decreed that the prayer of said amended petition for the appointment of some fit and proper person as the guardian of the person and estate of the said Gage H. Phillips, also known as Gage H. Moxey, ought to be, and is hereby, granted.

That said Harry Lester Mandeville be, and is hereby, appointed guardian of the person and estate of the said Gage H. Phillips, also known as Gage H. Moxey; that the said Harry Lester Mandeville be, and hereby is, required forthwith to execute and deliver to the said Gage H. Phillips, also known as Gage H. Moxey, a bond in the sum of \$100,000, with sufficient sureties, to be approved by the judge of said court, conditioned that he, the said Harry Lester Mandeville, as such guardian, will faithfully execute the duties of his

trust according to law; that upon the execution and giving of such bond, as aforesaid, and the filing thereof in this court duly approved letters of guardianship, in due form, be issued out of said court and under the seal thereof to the said Harry Lester Mandeville, as guardian of the person and estate of the said incompetent, Gage H. Phillips, also known as Gage H. Moxey, and that the said Harry Lester Mandeville, petitioner, be awarded and paid his costs herein out of the estate of said incompetent, such costs to be taxed hereafter in due course of the administration of the estate of said incompetent.

ESTATE OF THEODORE L. JOHNSON, DECEASED.

Probate of Destroyed Wills.—An Olographic Will destroyed by a friend of the testator in his presence, as being of no further use after a typewritten copy thereof had been made, is not "fraudulently destroyed," within the meaning of these words in the statute providing for the probate of lost or destroyed wills.

Edward C. Harrison, for proponent.

Bishop, Wheeler & Hoefler, for contestant.

COFFEY, J. A will destroyed in the presence and within the observation and with the consent of the destroyer, upon the suggestion of a disinterested friend that it was "of no further use and would better be destroyed," cannot be deemed "a fraudulently destroyed" will, within the meaning of section 1339 of the Code of Civil Procedure, so as to be entitled to probate under section 1338 of the same code, where it appears that such suggestion was honestly made in the full but erroneous belief, concurred in by the testator, that such will was worthless, and that a copy thereof signed by the testator and attested by only one witness was a legal and valid will, and there is nothing to show that any of the testator's heirs or other persons interested in his estate in any way connived at such destruction of his will, or had any knowledge of it until long afterward.

A fraud committed by a third person furnishes no ground of relief at law or in equity against one who did not participate in, or connive at, its commission.

To entitle a will to probate as having been "fraudulently destroyed" in the testator's lifetime, within the meaning of section 1339 of the Code of Civil Procedure, it must be shown that its destruction was procured through the fraud of some person interested to have such will destroyed.

The destruction of a will procured by alleged misrepresentations to the testator consisting merely of the honest expression of erroneous opinions as to matters of law by one holding no fiduciary relation to such testator, is not fraudulent destruction of such will within the meaning of Code of Civil Procedure, section 1339.

Our statute on the subject of trusts (Civ. Code, sec. 2215 et seq.) comprehends, classifies and defines all fiduciary relations known to our law, whether they are relations of technical trust or otherwise. Every fiduciary relation within the statute must be voluntarily assumed or must arise by operation of law.

Mere friendship between parties and the repose of confidence by one in the other will not alone create between them any fiduciary relation known to the law: See *Ruhl v. Mott*, 120 Cal. 668, 678, 679.

Where a testator applied to one, who had long been his friend, to attest his olographic will, and, upon the latter's suggestion, a typewritten copy of the will was prepared, signed by the testator, and attested by the friend as a witness, and such friend thereupon, without possessing or professing any knowledge of the law on that subject, expressed the opinion that the olographic will was "of no further use and would better be destroyed," honestly, though erroneously, believing that it was so, and that the typewritten will was legal and valid, and in consequence thereof the olographic will was destroyed with the testator's consent, it was held that these facts did not show that the friend had assumed any fiduciary relation to the testator so as to convert his honest but erroneous opinion upon such a matter of law into a fraudulent misrepresentation, and to make out a case of fraudulent destruction of the olographic will, within the meaning of Code of Civil Procedure, section 1339.

In order to make out a case of actual, as distinguished from constructive, fraud, a fraudulent or wrongful intent in doing the alleged wrong must be shown; as, where the destruction of a will in the testator's lifetime is alleged to have been procured by fraudulent misrepresentations, so as to entitle such will to probate as a "fraudulently destroyed" will under Code of Civil Procedure, sections 1338, 1339.

The fraudulent or wrongful intent necessary to make out a case of actual fraud cannot be presumed from the mere doing of the fraud or wrong alleged, but must be proved.

The contents of a will fraudulently destroyed in the testator's lifetime, in order to entitle such will to probate under Code of Civil Procedure, sections 1338, 1339, must be proved by two credible witnesses, and proof of such contents by one witness and a copy of the alleged will is not sufficient, especially where it appears that such copy is not a copy of the entire will, as where such alleged will was olographic and the copy does not include the date, or the like.

The Decision in the Principal Case is affirmed by the supreme court in 134 Cal. 662, 66 Pac. 847.

LOST OR DESTROYED WILLS AND THEIR PROBATE.

General Status of Lost or Destroyed Wills.—A properly executed will, which has not been revoked by the testator, retains its validity even though it cannot be found or has been destroyed, provided, of course, that its destruction was not *animo revocandi*: In *re Johnson's Will*, 40 Conn. 587; In *re Payne's Will*, 4 T. B. Mon. 422; *Steele v. Price*, 5 B. Mon. 58.

As was said by the court in *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340, in speaking on this subject: "The will then being in existence at the death of the testator unrevoked by him, its loss or accidental destruction differs not from the loss or destruction of any other solemn instrument, such as a deed, a note or bond, or a record. The contents, therefore, may be proved in like manner, as shown by the authorities cited. It is a postulate of the question that the testator left behind him at death a last will in writing, legally executed and published, and unrevoked by any act or direction of his. That the law will not tolerate any making of a will for him by other means than his own act in writing duly executed is clear. But such a will having a legal existence, yet accidentally lost or destroyed, the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. There is no greater sanctity, in

this respect, than the restoration by parol evidence of other instruments equally solemn and having an equal effect in the disposition of property. The law simply comes in aid of his own legally performed act, to prevent his intentions from being frustrated or defrauded."

Presumptions Arising from Inability to Find Will.—The law never presumes the existence of a will in the absence of proof: *Augustus v. Graves*, 9 Barb. 595. But where a will is proved to have once existed and the will was in the possession of the testator, or where he had ready access to it, the presumption arises that it was destroyed *animo revocandi* where it cannot be found after the testator's death: *Jaques v. Horton*, 76 Ala. 238; *Scott v. Maddox*, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500; *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *Minor v. Guthrie* (Ky.), 4 S. W. 179; *Davis v. Sigourney*, 8 Met. 487; *Hamilton v. Crowe*, 175 Mo. 634, 75 S. W. 389; *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151; *In re Willitt's Estate* (N. J. Eq.), 46 Atl. 519; *Hard v. Ashley*, 88 Hun, 103, 34 N. Y. Supp. 583; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 558; *In re Bell's Estate*, 13 S. D. 475, 83 N. W. 566; *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025; *Minkler v. Minkler's Estate*, 14 Vt. 125; *Appling v. Eades*, 1 Gratt. 286; *Jamison v. Snyder*, 79 Wis. 286, 48 N. W. 261. Hence if the evidence shows that a lost will was last seen in the possession of the testator when he was mentally competent, it is presumed that he destroyed it *animo revocandi*, and the burden of proof is on the proponent to overcome this presumption: *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248.

And it has been observed that: "It is therefore a natural presumption merely because it cannot be supposed the testator would part with it unless he intended to put it out of the way, and because it is out of the way and cannot be accounted for, the presumption that he intended to revoke it arises. Like other natural presumptions drawn from evidence and not declared *de jure*, for some legal end, it must give way to stronger evidence of the continued existence of the will and the testator's reliance upon it as the disposition he had made of his property": *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340.

But, on the other hand, where the will was not in the custody of the testator, the fact that it cannot be found raises no presumption that he destroyed it *animo revocandi*: *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874; *In re Gardner's Estate*, 164 Pa. 420, 30 Atl. 300; *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148; *In re Steinke's Will*, 95 Wis. 121, 70 N. W. 61.

Necessity to Rebut the Presumption of Revocation.—This presumption of revocation arising from the inability to find a will which had been in the possession of the testator is, of course, a rebuttable one

Davis v. Sigourney, 8 Met. 487; *In re Willitt's Estate* (N. J. Eq.), 46 Atl. 519; *Minkler v. Minkler's Estate*, 14 Vt. 125. The burden of rebutting this presumption is upon the proponent of the lost will: *Jaques v. Horton*, 76 Ala. 238; *Scott v. Maddox*, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500. And in order to overcome it, the proponent of the lost or destroyed will must prove that the testator did not destroy the will *animo revocandi*, and that he died believing it to be in existence: *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 588; or by showing that it was improperly or fraudulently destroyed during the lifetime of the testator: *Idley v. Bowen*, 11 Wend. 227.

Declarations of the testator having a tendency to show that if he destroyed it, he did so without intent of revoking it, as by accident or mistake, or, on the other hand, that he did so with an intent to revoke it, are admissible on the question of whether the will was destroyed *animo revocandi*: *Hamilton v. Crowe*, 175 Mo. 634, 75 S. W. 389; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820; *In re Steinke's Will*, 95 Wis. 121, 70 N. W. 61; monographic note to *In re Colbert's Estate*, 107 Am. St. Rep. 468.

The presumption of revocation may also be rebutted by circumstantial evidence: *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209. Thus where the testator was careless about his papers, and his wife, who was cut off in the will, was present during several days prior to his death while he was unconscious, and had access to his papers, and she refused to deliver up his papers until an action was brought for that purpose, it was held sufficient to rebut the presumption of revocation arising from the fact that the will was last known to have been in the possession of the testator: *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395. Likewise, where the will was in the possession of the attorney who drew it, the presumption of revocation may be overcome by showing that it was burned while in the possession of the attorney by reason of his place being destroyed by fire: *Codington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874.

Distinction Where Will Lost Before and Where After the Death.—

Where a will was lost or destroyed after the death of the testator, it is necessary to show that it was in existence at the time of his death, but where the will was lost or destroyed before his death, it is necessary to show that it was destroyed without testator's knowledge or consent: *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130. But in some of the states, as, for instance, in California and New York, the matter is regulated by statute, to the effect that a lost or destroyed will, in order to be probated, must be proved to have been in existence at the time of the death of the testator, or shown to have been fraudulently destroyed in the lifetime of the testator: *Estate of Kidder*, 57 Cal. 282; *Estate of Johnson*, 134 Cal. 662, 66 Pac. 847; *Timon v. Claffy*, 45 Barb. 438; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *In re Reiffeld's Will*, 36 Misc. Rep. 472, 73 N. Y. Supp. 808.

And in Ohio it was held under a statute which made provisions for the probate of wills not revoked at the death of the testator, where the original will has been lost, spoliated, or destroyed subsequently to the death of the testator, but omitting any provisions respecting wills lost during the lifetime of the testator, that a will lost, spoliated, or destroyed could not be established unless it existed subsequently to the death of the testator, the court observing: "If all this legislative machinery was to establish a will lost after the death of the testator, why is it that all provision whatever is omitted for the establishment of proof and record of a will lost before the decease of the testator? The answer is obvious: The General Assembly deemed it either impolitic, as opening the door to imposition and perjury or unnecessary, to permit wills lost or destroyed before the decease of the testator to be established. This court cannot, by construction, enlarge the terms of a statute so studiously limited and circumscribed": *Matter of Sinclair's Will*, 5 Ohio St. 290.

The decisions respecting the construction of statutes of this character are not entirely satisfactory. They will be discussed in the next subdivision.

Statutes Requiring Proof of Fraudulent Destruction in Lifetime of Testator.—In New York under a code section which allowed any will "lost or destroyed by accident or design" to be established the same as in the case of lost deeds, but requiring proof that the will had been in existence at the time of the death of testator or that it had been fraudulently destroyed in the lifetime of the testator, the court observed: "That it has been lost or destroyed by accident or design is conceded, and the supreme court had therefore jurisdiction to take proof of the execution and validity of the will, and to establish the same. But the learned judges of the supreme court have supposed that it could not be established unless there was affirmative proof that the will was in existence at the time of the testator's death, or that it was shown that it was fraudulently destroyed in the testator's lifetime. Both or either of these propositions may be established, as well by circumstantial as positive evidence.

"As to the existence of the will at the time of the testator's death, we have the conceded fact of the execution of the will, and of the deposit of the same with a custodian for safekeeping. The custodian testifies that after it was delivered to him, at the time of its execution, he never parted with its possession, but locked it in a trunk, and supposed it was there at the time of the testator's death. Upon search made for it after his death, it could not be found. There is not a scintilla of evidence or a circumstance to show that the testator ever had possession of the will after its execution and delivery to the custodian. It follows, therefore, as a legal conclusion that this will was in existence at the time of his death (if not, then fraudulently destroyed or lost), in which event, it being now lost or destroyed either by accident or design, it should be established as a valid will.

"If the will was not in existence at the time of the testator's death, then it follows equally clear that it must have been fraudulently destroyed in his lifetime or lost. The fraud mentioned and referred to in this connection is a fraud upon the testator by the destruction of his will, so that he should die intestate, when he intended and meant to have disposed of his estate by will, and never evinced any change of that intent. It is undeniable from the facts in the record that either this will was in existence at the time of the death of this testator, or that it had been destroyed in his lifetime, without his knowledge, consent or procurement, or accidentally lost. If so lost, it was done fraudulently as to him, and in judgment of law the legal results are the same precisely as if it had continued in existence up to the time of his death. In either contingency, it was his last will and testament, and its loss or destruction either by accident or design being proven, it is the duty of the court to establish it as the will of this testator": *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88.

Another view, however, of that statute had been taken in *Timon v. Claffy*, 45 Barb. 438, decided the previous year. It was there observed: "The question of the fraudulent destruction of a will, under this section, must be one of fact. Fraud is never to be presumed. This is a fundamental rule. It is never to be imputed or inferred but must be proved by satisfactory evidence.

"The fraud in the destruction of a will must consist in some deceitful contrivance, device or practice, to defeat the wishes and intent of the testator in regard to his will. The fraud can only be alleged as against him, for during his life, no one else can have any legal rights or vested interests in a will to be defrauded. No one else can be defrauded until after his death, by the destruction of his will. The testator has the unqualified right, while in the full possession of his facilities [faculties] to destroy his own will at any time, or in any mode or manner he pleases, and I cannot see how it can be alleged or held that any fraud is or can be committed by any person in destroying or assisting to destroy a will by the express direction and in the presence of the testator, though it be not done in the presence of two witnesses so as to revoke it under section 42. The refusal, therefore, of the circuit judge to instruct the jury in this case, that if this will was destroyed in the presence of James Claffy and at his request, but not in the presence of two witnesses, as required by section 42, such destruction was fraudulent, was not erroneous, and the exception to such refusal was not well taken." This case was followed in *Re De Groot's Will*, 9 N. Y. Supp. 471.

The mere fact that the testatrix, while sick and in a half-asleep condition, dropped the will which she had been examining into the fire, and that her nurse did not rescue it, does not show a "fraudulent destruction" under the statute requiring proof of a fraudulent destruction in order to have a lost or destroyed will probated: In *re Kidder's Estate*, 66 Cal. 487, 6 Pac. 326. And in a later California

case it was said that in order to make the destruction of a will fraudulent within the code section, there must be the assertion of some fact not warranted by the information of the person making it. Hence, the destruction of an olographic will by a friend of the testator, as being, in the opinion of the friend, of no further use after the signing of a typewritten copy which had been suggested as a better form of will is not a fraudulent destruction, regardless of how erroneous such opinion may be, or with what degree of positiveness it may have been asserted: *Estate of Johnson*, 134 Cal. 662, 66 Pac. 847.

In an early case in the surrogate court of New York, it was stated that the destruction of a will without the knowledge or consent of the testator, in disregard of his intention, and to the injury of the person who was made the object of his bounty, is fraudulent within the meaning of the statute, though there was no fraud in the sense of an intent to benefit by it or deceive or injure anyone: *Early v. Early*, 5 Redf. Sur. 376. And in *Re Reiffeld's Will*, 36 Misc. Rep. 472, 73 N. Y. Supp. 808, the surrogate, in discussing the effect of an accidental destruction of the will of testator during his lifetime by a fire, the occurrence of which it was shown that he was informed of, said: "A will destroyed during the lifetime of a testator, in order to be admitted to probate, must be shown to have been fraudulently destroyed. 'Fraud' is defined by the Standard Dictionary in its legal aspect as 'any artifice or deception practiced to cheat, deceive or circumvent another to his injury'; (2) 'any act, omission or concealment that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another.' 'Fraudulent' is defined objectively as 'based or proceeding from, or characterized by fraud.' 'Fraudulently' is an adverb of the same meaning, and is here used to characterize the manner of destruction intended by the statute. Here was no fraudulent destruction such as is provided for by statute, but only an accidental destruction for which no provision is made. The title to all property, real and personal, vests primarily in the sovereign state upon the death of the owner, and can only be devised or bequeathed in the manner and to the extent provided by statutes, which are to be strictly construed; so that I must determine, as a matter of law, that the accidental destruction of this instrument now offered for probate was fraudulent. I am unable to arrive at such a conclusion. The authorities referred to by the proponent do not, in my judgment, so decide. The will was destroyed accidentally, without the consent or knowledge of the testator; and by a failure to admit this instrument to probate, a different disposition will be made of his property than he intended. As I construe the statute, and construe the term 'fraudulently' as applicable thereto, it appears to me that, in order to come within the lines thereof, there must be some intervening human agency in motion, or set in motion, to have brought about its destruction. I am unable to see how the mere accidental destruction of this instrument

through the fault of no one, through the active agency of no one, can be construed or deemed of such a fraudulent character as to permit of the application of the statute."

What Constitutes a Fraudulent Destruction of the Will.—Where a will was in testator's desk after his death, and a few days later it cannot be found, and there are marks of violence upon the desk showing the lock to have been broken open, a spoliation is shown, and it is not necessary for the proponents of the destroyed will to be able to designate the person who carried the will away: *Bailey v. Stiles*, 2 N. J. Eq. 220. And where a will devising the estate to the fiancé of testatrix was destroyed on the day of her death, by her brother burning it in the presence of several persons, but not in the presence of the testatrix, and under circumstances indicating stealth, the testatrix having declared repeatedly up to the morning of her death, that she had not changed her mind with respect to devising her estate to her fiancé it was held that the facts showed an actual fraudulent destruction of her will during her lifetime: *In re De Groot's Will*, 9 N. Y. Supp. 471.

Declarations of an heir of the testator, who is not a party to the record, to the effect that he destroyed the will after the testator's death, are merely hearsay and not admissible as against other persons interested in the case: *Scott v. Maddox*, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500.

Effect of Mere Opportunity to Destroy as Evidence of Fraudulent Destruction.—The mere fact that several persons had opportunities to destroy the will had they seen fit to do so is no evidence to establish a fraudulent destruction of the will: *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; *In re Kennedy's Will*, 53 App. Div. 105, 65 N. Y. Supp. 879. Hence, the mere opportunity to destroy the will on the part of interested persons is not sufficient to rebut the presumption that the testator destroyed it for the purpose of revoking it: *Scott v. Maddox*, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500. In speaking on this subject, the court in *Bauskett v. Keitt*, 22 S. C. 187, said: "In this case there was no allegation or evidence tending to show that the will had been destroyed by accident, but the whole case of the plaintiffs depended upon their being able to show that the will was destroyed by the heirs at law, because it was to their interest so to do. This would have been a criminal act on their part, and, to establish it, there must be evidence satisfactory to the tribunal (in this case the jury) intrusted with the trial of the issue. Indeed, the very ground upon which the rule is based, that where a will is traced to the possession of the testator, and it cannot be found after his death, the presumption is that the testator himself revoked it, is that the law will presume that an innocent, rather than a criminal act, has been done. Hence, in such a case, the law will presume that the will was destroyed by the testator, which would be an innocent act, rather than that it was destroyed by the heirs at law, even

though they might have an interest so to do, and might, by reason of their close relations to the testator, have the best of opportunities of so doing; because if they did it, their act would be a criminal one, which the law will not presume, but will require to be established by satisfactory evidence."

But the presumption of revocation by the testator does not arise where the will was in the possession of one whose interests would not be subserved by the provisions of the will. Thus in *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, the court said: "The authorities are practically in accord upon the proposition that where a will which, when last seen, was in the custody of the testator, cannot be found after his death, a presumption arises that it has been revoked. The proposition is evidently based upon the theory that it is a reasonable inference from the facts that the custodian, who in such case is the testator, has destroyed it for the purpose of revoking it. On the other hand, there is authority for holding that when at last accounts the will was in the hands of some one other than the testator—and especially in the possession of one to whose interest its provisions are adverse—the presumption of its destruction by the testator does not arise from the mere fact that it cannot be produced. It may be that, if the will is shown to have been destroyed, it would not be presumed that it was the act of some one other than the testator, for the reason, as given by the English courts, that it would not be presumed that the custodian had committed a crime. But in this case the testimony traces the will, when last seen, into the possession of the husband of the testatrix; and it also appears therefrom that by the instrument all her property was devised to the proponent, and that the husband was an heir to her estate. It does not show that the will was destroyed. It is merely shown that it could not be found. It may be that it has been lost. While it may not be permissible to infer that the husband had destroyed it, there is room for the presumption that he may have lost it. It is no offense against the law to lose an instrument in writing, and therefore it is not necessary to determine in this case whether to destroy the will of another, without authority to do so, is under our law, where all penal offenses are defined by statute, a criminal act or not. Therefore, we think that under the evidence adduced in this case, according to the rule generally recognized by the courts, the trial judge was at least authorized to find, as he did find, that the will had not been revoked." Still, the fact that the contestant of the lost will had an opportunity to destroy the will is a circumstance which may be considered with other proof on the question of overcoming the presumption that the will was destroyed by the testator: *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395.

Undue Influence in Procuring Destruction of the Will.—To prove that the destruction of a will was procured by undue influence, evidence showing what took place in the sick-room between the time

that the will was sent for and its being brought to testator, who then destroyed it, is admissible as part of the *res gestae*: *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504.

What must be Shown with Respect to Lost or Destroyed Will.—

Where it is sought to prove the substance of a will not produced for probate, it is incumbent on the proponent to establish the fact that this testator made a valid will; the contents or substance of the will, or of such portion as might be recorded as his will; and that the will, though not in existence at his death, had not been revoked by him: *Chisholm v. Ben*, 7 B. Mon. 408. But frequently the statute prescribes what must be proved with respect to lost or destroyed wills, as in California, New York, and Ohio: *Estate of Johnson*, 134 Cal. 662, 66 Pac. 847; *Harris v. Harris*, 26 N. Y. 433; *In re Sinclair's Will*, 5 Ohio St. 290. Likewise in establishing an olographic will, it is necessary to prove all the essentials of an olographic will: *Lucas v. Brooks*, 23 La. Ann. 117; *Fuentes v. Gaines*, 25 La. Ann. 85.

The proponent of a lost will must prove that the will was actually in existence at the time of the testator's death or that it is in existence in contemplation of law: *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367; *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248. And where the mental incapacity of the testator to revoke the lost will is relied upon, it is not sufficient to show that the will may have been in existence after the time that the mind of the testator became impaired, but its actual existence after that time must be shown: *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492.

And, of course, one seeking to establish a lost or destroyed will has the burden of proving that it was not destroyed by the testator with intent to revoke it: *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

Stipulation or Admission as to Contents.—A lost or destroyed will cannot be admitted to probate on a stipulation of counsel as to its contents: *Matter of Ruser*, 6 Dem. Sur. 31. And an admission upon the record that a paper had been duly executed as the last will and testament of the deceased does not dispense with the production of the testimony required by law to prove the execution thereof: *Hylton v. Hylton*, 1 Gratt. 161.

Necessity for Institution of a Search for Missing Will.—To entitle a party to give parol evidence of the contents of a lost will, where there is no conclusive evidence of its destruction, it must be shown that diligent search has been made in those places where it would be most probably found: *Bryan v. Walton*, 14 Ga. 185; *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395. Hence where a known will which, after being sent for by the testator, to be destroyed, was declared by the testator to have been destroyed, it is proper to search for it among the papers of the testator, although the presumption arises that it was destroyed: *Bulkley v. Redmond*, 2 Bradf. Sur. 281. But search for a will after the death of the testator need not be shown where it is

claimed that the will was fraudulently destroyed after such death and there is evidence to support such claim: *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812.

General Character of Evidence Admissible to Establish Will.—The best evidence which the nature of the case will admit of is admissible to prove the contents of a lost or destroyed will, but where the best evidence is not obtainable, a resort may be had to secondary evidence: *Davis v. Sigourney*, 8 Met. 487; *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105; *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395; *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194. Hence, it is said that where a will is lost or destroyed, as in the case of a deed, the next best evidence of its execution and contents is admissible, but it is also observed that "the proof of the loss being addressed exclusively to the court and for the satisfaction of the judge, need not be as strict and technical as is required by the general rules of evidence": *Fetherly v. Waggoner*, 11 Wend. 599. In *Jaques v. Horton*, 76 Ala. 238, the court, in discussing the admissibility and weight of secondary evidence to prove a lost will, said: "While the doctrine that there are no degrees in secondary evidence has not prevailed to its fullest extent, in this state, we are not prepared to adopt a stringent extension of the rule, which excludes all secondary, until the absence of the primary evidence is accounted for, to secondary evidence. Where the secondary evidence offered, *ex natura rei*, supposes a higher degree of secondary evidence, the best should be produced. 'But, where there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not admissible by other rules of law, unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud which the law itself presumes when primary evidence is withheld.' When a certified or examined copy of paper required to be recorded, or a letter-press copy of a writing is shown to be in existence, it is better evidence than the memoriter statements of a witness, and its production should be demanded: 1 *Greenleaf on Evidence*, sec. 84n; *Cornett v. Williams*, 20 Wall. 226, 22 L. Ed. 254."

And in an early case in Virginia, it was said with respect to the admission of parol evidence of the contents of a will, the probate records of which were destroyed during the war of the Revolution, that: "The rule is, that the best evidence that the nature of the case will admit of is to be received. On this principle, I think the evidence was admissible, though parol proof of the contents of an instrument must be generally very defective (it being seldom possible, after a lapse of time, that the witness can recollect the precise expressions in it, or their collocation, on which its meaning often depends), yet in aid of a long and continued possession in the defendants, and those under whom they claim, such testimony may be resorted to. It is the best evidence the nature of the case will admit

of": *Smith v. Carter*, 3 Rand. 167. Hence the contents of a lost will may be proved by parol evidence: *In re Lane's Will*, 2 Dana, 106; *Lucas v. Brooke*, 23 La. Ann. 117; *Legare v. Ashe*, 1 Bay (S. C.), 464. And likewise the existence or loss of the will may be shown by circumstantial evidence: *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148. So, also, the presumption of revocation may be rebutted by either direct or circumstantial evidence: *Matter of Johnson's Will*, 40 Conn. 587. And it is even held that evidence of testator's character is admissible to show his tenacity of purpose and thus affect the probability of his revoking his will: *Brown v. Brown*, 10 Yerg. 84.

Admissibility of Declarations of Testator.—Inasmuch as the question of the admissibility of the declarations of a testator on an application to probate a lost will has been treated in the very recent monographic note attached to *In re Colbert's Estate*, 107 Am. St. Rep. 468, we shall not again discuss the subject. The general rule as shown by the note just referred to is that where the execution of a will is proved, and the question is whether it continued in existence unrevoked at the time of the testator's death, notwithstanding it cannot be found, his declarations are admissible either to repel or to support the presumption of its destruction and revocation.

Burden of Proof Respecting Lost or Destroyed Wills.—The burden of proof on the probate of a lost or destroyed will is upon the party offering the will for probate: *Newell v. Homer*, 120 Mass. 277; *Graham v. O'Fallon*, 3 Mo. 507; *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874; *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148; *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194. Consequently, one seeking to establish a lost or destroyed will assumes the burden of overcoming, by adequate proof, the presumption that it has been destroyed *animo revocandi*: *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110.

In proceedings under the New York code to establish a lost or destroyed will, the burden is on the proponent of the will to show that the will was in existence at the time of the testator's death, or that it was fraudulently destroyed during his lifetime: *Perry v. Perry*, 66 Hun, 629, 21 N. Y. Supp. 133.

Quantum of Proof Necessary to Establish Will.—The courts are not harmonious in their characterizations of the quantum or degree of proof necessary to establish a lost or destroyed will. In *Jaques v. Horton*, 76 Ala. 238, the court said: "We can conceive no valid reason why there should be any difference in the quantum of proof necessary to establish the contents of a lost will, and the contents of a lost deed, or other written instrument. In either case, the proof must be satisfactory and probably more caution should be observed in the case of a lost will, as the testator cannot be heard in respect to the disposition he has made of his estate, and as a will is required to be attested by two witnesses."

Likewise in *Davis v. Sigourney*, 8 Met. 487, the court observed: "To authorize the probate of a lost will by parol proof of its contents, depending on the recollection of witnesses, the evidence must be strong, positive, and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act on probabilities."

The different courts, however, vary in their characterizations of the proof necessary. Thus it has been said that the contents can be shown by such evidence as will satisfy the tribunal whose duty it is to decide the question: *Morris v. Swaney*, 7 Heisk. 591; *McNeely v. Pearson* (Tenn. Ch.), 42 S. W. 165. The will may be established upon satisfactory proof of its destruction and of its contents, but whether the proof be by one witness or by many, it must be clear, satisfactory and convincing: *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401. Sometimes it is said that the evidence must be full and satisfactory: *Dudley v. Wardner's Exr.*, 41 Vt. 59; clear and satisfactory; *Matter of Johnson's Will*, 40 Conn. 587; strong, positive and free from doubt: *Newell v. Homer*, 120 Mass. 277; *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194; clear and explicit: *Buchanan v. Matlock*, 8 Humph. 930, 47 Am. Dec. 622; clear, conclusive and satisfactory: *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 153; or the clearest, most conclusive and satisfactory proof: *Nunn v. Lynch*, 73 Ark. 20, 83 S. W. 316; *Rhodes v. Vinson*, 9 Gill, 169, 52 Am. Dec. 685. And it is also observed that courts of equity do not set up lost wills except where it is clearly shown that it should be done: *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492. And in New Jersey it is said that the execution and contents must be proved with clearness and certainty: *In re Willitt's Estate* (N. J. Eq.), 46 Atl. 519; or that the proof must be clear and convincing: *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874. So, also, it is said that the evidence to overcome the presumption that a lost will was destroyed by the testator animo revocandi must be clear, satisfactory and convincing: *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248. And parol evidence for the purpose of showing that a former will was revoked by implication in the lost will must be clear, unequivocal and convincing: *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151.

Though the evidence of the contents of a lost will must be clear, full and satisfactory, it need not be such as to remove all reasonable doubt from the minds of the jury as to the substantial parts of the instrument: *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110.

The supreme court of California, construing a section of the code which required the provisions of the lost or destroyed will to be "clearly and distinctly proved by at least two credible witnesses," said: "This provision of the code, being remedial in its nature, is to receive a liberal construction, and is held to apply as well to a mutilated will, or one in which some of its provisions have been destroyed: *Hook v. Pratt*, 8 Hun, 102. The above section does not

require that the witnesses shall reproduce the exact language of the testator, but that the 'provisions' of the will shall be 'clearly and distinctly proved.' If their testimony respecting the contents of the lost portion of the will coincides as to the provisions therein made by the testator, the court is authorized to establish such provisions as a portion of the will, even though the witnesses may differ as to their remembrance of the exact language used by the testator": *Estate of Camp*, 134 Cal. 233, 66 Pac. 227.

Degree of Proof as Against the Spoliator.—"Where one deliberately destroys or purposely induces another to destroy a written instrument of any kind, and the contents of such instrument subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded thereon": *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223.

Effect of Lapse of Time on Quantum of Proof Necessary.—The lapse of time naturally affects the weight of testimony respecting the contents of lost wills, and especially where the provisions of the will are alleged to have been somewhat complicated. Thus in *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105, in a case of this kind, the court said: "For example, if perfect knowledge, a reasonable time, and a simple fact, be the question, and the witness reasonably intelligent, the contents might be satisfactorily proved by the recollection of the witness. Thus an intelligent witness, called upon to prove the contents of a will recently read by the witness, which devised a known tract of land to Peter Duncan, would not risk the miscarriage of justice. But in a case where a title and possession have been long enjoyed unchallenged, when such title is assailed only after the destruction of the records, by a witness who testifies to the contents of a paper she had never read, and of which she has never read an authenticated copy, and bases her knowledge upon having heard the will read, by an indifferent person, sixty-eight years before, when she was an infant, and so testifies, when she is an octogenarian, not to the devise of Peter Duncan simply, but as to the degree of estate so devised, and crowns the whole by making her (X) mark, instead of signing her name, we may well hesitate before we disturb an old title and possession upon such evidence. In this case there are many difficulties in the question as to the weight of this evidence. In 1880, could any person be expected to retain a perfect or a safe recollection of the contents of a paper read in her hearing in 1812? But when this is claimed for a young girl, who heard the paper read by a neighbor, and never heard it again for so many years, we might admit that the neighbor read the will correctly (a fact which she cannot prove), and then that she heard correctly, and yet we may well question whether her recollection is correct."

So, also, in *Todd's Heirs v. Wickliffe*, 12 B. Mon. 289, the court in adverting to the inconsistencies in the testimony of a witness of intelligence and fine character respecting the terms of a will which

had been destroyed nearly fifty years before in the burning of a courthouse, observed that: "It all shows the frailty of human memory, and how little reliance is to be placed upon our recollection of the language, or even the substance of a written instrument after many years have gone by. Indeed, there is scarcely a competent lawyer who will venture to advise an applicant as to the meaning and effect of any devise in a will, upon his mere statement, although he may have come recently from its perusal. Before hazarding an opinion, he will dispatch his client for the instrument or a copy."

But where a lost will is more than thirty years old, and premises devised by it have been held under it from the time of the death of the testator, very slight evidence showing its proper execution will be deemed sufficient: *Fetherly v. Waggoner*, 11 Wend. 599.

Effect of Number of Witnesses Testifying to the Execution or Contents.—In the absence of statutory provisions requiring more than one witness, the contents of a lost or destroyed will may be established by one witness: *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110; *Matter of Page*, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Jackson v. Vickory*, 1 Wend. 406, 17 Am. Dec. 522. One witness is sufficient to establish the contents of a lost page of a will: *Varnon v. Varnon*, 67 Mo. App. 534. The proof of execution of a will may be made by one of the subscribing witnesses only, although the will be lost and the witness has forgotten the name of one of the other subscribing witnesses: *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395. And one of the subscribing witnesses will be sufficient to prove the execution of the will if he can prove that he saw the other witnesses subscribe it in the testator's presence: *Graham v. O'Fallon*, 3 Mo. 507.

The testimony of a single witness that the will was wholly written and signed by the testator is sufficient to set up such will if its loss after death of the testator is shown and its contents are satisfactorily made out: *Baker v. Dobyns*, 4 Dana, 220. But in Louisiana, it has been held that in proving a lost olographic will, two credible persons who have often seen the testator write and sign his name are necessary: *Fuentes v. Gaines*, 25 La. Ann. 85.

Perhaps the most famous case in which the contents of a complicated lost will were established by the evidence of a single witness was that of *Sugden v. Lord St. Leonards*, [1876] L. R. 1 P. D. 154. In that case the contents of the will were established by the daughter of the testator, who was interested as a devisee, but whose veracity was unquestioned. The witness had been the private secretary of her father, who was considered one of the ablest lawyers in England.

In *Klarno v. Klarno*, 4 Harr. 83, a will destroyed by an heir at law was admitted to probate on proof of its contents by one witness and the production of a rough draft, which had been found among the papers of the testator.

Where a testator having two wills in his possession, and intending to destroy the last will, by mistake destroys the first, the law does not require proof by two witnesses in order to establish the will intended to be destroyed: *Burns v. Burns*, 4 Serg. & R. 295.

The court, in *Jacques v. Horton*, 76 Ala. 238, very pertinently observed: "The testimony of a single witness who has read and remembers the contents of the will may be sufficient. Such evidence, however, should be clear and positive—not vague or uncertain recollections—and of such character 'as to leave no reasonable doubt as to the substantial parts of the paper.'"

It would seem that allowing a witness to state his mere recollection of the substance of a lost will of a complicated character is to, in effect, allow the witness to judicially construe the will without allowing his construction to be reviewed by considering whether the language employed in the will warranted the construction given by the witness. Of course, where the will made no attempt to devise the estate upon varying contingencies, it is quite likely that a non-professional witness could recollect the language employed in the will, and thus obviate the liability of the witness construing the will instead of testifying to the language employed in the will.

Effect of Code Provisions Respecting the Number of Witnesses Necessary.—Under a code provision of Georgia, it was necessary to establish the execution of a will destroyed since the death of the testator by the three subscribing witnesses if they are alive and within the jurisdiction of the court: *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453. And under a code provision requiring in case of loss "a copy of the same clearly proved to be such by the subscribing witnesses," the existence of the will must be proved by all the subscribing witnesses: *Mosely v. Carr*, 70 Ga. 333. And where the statute provides that no will shall be allowed to be proved as a lost will unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, a copy of the will, even if proved to be correct, is not a substitute for a credible witness, nor is the evidence of only one witness who saw but did not read the will sufficient: *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148. So, also, under a code provision requiring two credible witnesses to the contents of a lost or destroyed will, testimony of one witness to its provisions, and to the fact that it was executed as drawn by a certain lawyer, together with testimony of the lawyer as to the provisions of the will as drawn by him, and testimony of another witness who saw the will after it was executed, but who did not remember all of its provisions, is not sufficient: *In re Waldron's Will*, 19 Misc. Rep. 333, 44 N. Y. Supp. 353. Under a code provision requiring that the provisions of a lost or destroyed will must be clearly proved by two credible witnesses, each of the witnesses must be able to testify as to all the disposing parts of the will: *Matter of Ruser*, 6 Dem. Sur. 31; *Todd v. Rennie*, 13 Colo. 546, 22 Pac. 898.

Establishment by Proof of Incapacity of Testator to Revoke Will.—

Where it is sought to establish a will destroyed by the testator on the ground that he was mentally incapable of revoking it, the court in *McIntosh v. Moore*, 22 Tex. Civ. 22, 53 S. W. 611, observed: "The burden of proving that he did not have such testamentary capacity at the time the will was destroyed was put upon the proponent, and it is not sufficient to show that a part of the time during the period between when the will was last seen and the time of his death, he did not possess such capacity; but it must reasonably appear from the evidence that at the time of its destruction he was lacking in testamentary capacity, for he may have been, during a part of the time that elapsed from the time when the will was last seen, and his death, incapable of revoking it, yet at the time of its destruction he may have possessed the necessary testamentary capacity."

Establishment of Lost Will Revoking a Former Will.—Parol evidence of the contents of a will subsequent to the one produced for probate, which subsequent will has been lost, destroyed, or canceled, is admissible to establish the revocation of the will produced: *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393. Evidence of the contents of an alleged lost will relied upon as a revocation of a prior one, offered for probate, is inadmissible in the absence of evidence that it was executed in the presence of two witnesses as required by the statute: *McKenna v. McMichael*, 189 Pa. 440, 42 Atl. 14. And it must also be shown that the lost will either in express terms revoked the former will or that its provisions in devising the property were so far inconsistent with the former will that it would operate as a revocation: *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620. The evidence to oppose the probate of a will may consist in the mere proof of a revocatory clause in a later will which has been lost or destroyed, even though the proof as to the entire contents be insufficient to admit the lost will to probate: *In re Cunningham*, 38 Minn. 169, 8 Am. St. Rep. 650, 36 N. W. 269; *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151. Where a will offered for probate was claimed to have been revoked by a later will drawn by the same attorney, testimony of the attorney who drew the will to the effect that the testatrix came to his office to have him draw the second will, whereby she desired to revoke the former will, and make certain changes in it, but, at the same time, did not desire to allow her husband, in whose hands the former will was to know of such changes, that she was anxious to have witnesses to the will, who would not speak of the fact of having witnessed the will, and that he remembered the date of the will, and the substance of the provisions, together with the testimony of the other witness to the will, a physician, who had offices next to those of the attorney, to the fact of execution, was held sufficient to prove the lost will: *In re Bell's Estate*, 13 S. D. 475, 83 N. W. 566.

Matters Relating to Proof of the Execution of Will.—The execution of a lost will must be shown by proof of all the statutory require-

ments respecting the execution of wills in the same manner as if the will had not been lost: *Morell v. Morell*, 157 Ind. 179, 60 N. E. 1092; *Fuentes v. Gaines*, 25 La. Ann. 85; *Collyer v. Collyer*, 4 Dem. Sur. 53; *Grant v. Grant*, 1 Sand. Ch. 235; *In re Hitchler's Will*, 25 Misc. Rep. 365, 55 N. Y. Supp. 642; *In re Purdy's Will*, 46 App. Div. 33, 61 N. Y. Supp. 430; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619. That is, the execution of a will must be proved by the subscribing witness, as provided by law, whereas the loss or destruction of the will or its contents may be shown by any other competent evidence: *Scott v. Maddox*, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500.

And the burden is on the party setting up a lost will to prove its execution, as well as its contents by strong, positive and convincing testimony: *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194; *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151.

But where the evidence shows that the lost or destroyed will was in the possession of a party interested in its suppression, a presumption arises that it was executed in the form prescribed by law: *Anderson v. Irwin*, 101 Ill. 411; *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223. On the question as to the admissibility of declarations of the testator to prove the fact of execution of the lost will, see the monographic note to *In re Colbert's Estate*, 107 Am. St. Rep. 460.

Necessity of Calling All Subscribing Witnesses.—Where all the subscribing witnesses to a lost will are within the jurisdiction of the court, they must be called. In such a case they are not the witnesses of either party, but of the court. But where one of the witnesses is dead, and another has removed beyond the jurisdiction of the court, the rule does not apply: *Bailey v. Stiles*, 2 N. J. Eq. 220.

Inability of Subscribing Witness to Recollect Facts.—Testimony of one subscribing witness that the lost will was executed in his presence, that of another named person, and another person whose name he could not recollect, but whom he knew to be a credible witness, is sufficient evidence of the proper execution of the lost will: *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395. And where one witness testified that he had no recollection of seeing the testator sign the will in the presence of the subscribing witnesses, but another witness (testator's wife) testified affirmatively that he did sign, in their presence, the court observed: "The rule of law is clear in such case; the affirmative witness must prevail. There is one consideration here worthy of being noticed. The will was executed in the year 1829, and the witnesses were examined in 1835. A period of six years had passed, and it would be no very strange occurrence that even a subscribing witness should not remember everything that took place at the time of the execution. Mr. Johnson, although evidently a very accurate witness, and, judging from his testimony, a cautious and just man, had no interest or feeling in this transaction. The wife of the testator was

his nurse, was present, held him up in the bed, and was greatly interested, no doubt, at the time, in all that was passing. The witness not only swears that her husband signed the will in the presence of the witnesses, but states all the circumstances. While the proof is not as full on this point as I could have wished, yet by the rules of law as well as from the whole tenor of the evidence, I must declare the proof in the case to be that the will was signed by the testator in the presence of the witnesses': *Bailey v. Stiles*, 2 N. J. Eq. 220.

But where the scrivener, who produced a draft of the lost will, containing neither the name of the testator nor the names of the witnesses, could not positively testify whether he was a subscribing witness, but thought that he was, but could not state whom the other witnesses were, the proof was regarded as insufficient to allow the will to probate: *Collyer v. Collyer*, 4 Dem. Sur. 53.

Testimony of an Attorney that He Drew the Will, but could not recollect who witnessed it, though he was in the habit of witnessing such wills himself, and having his clerk, if present, also witness them, together with like testimony from his clerk, except that the clerk had an impression, but no certainty, that he and the attorney witnessed the will, is not satisfactory proof to establish the execution of a lost or destroyed will: *Grant v. Grant*, 1 Sand. Ch. 235.

Proof of Continued Existence of Will or Rebuttal of Presumption of Revocation.—Where a testatrix, a woman over seventy years of age, left her will for safekeeping with her lawyer, who placed it in his desk with other valuable papers, no one outside of his family having access to the desk, and the lawyer testifies that no one called for the will, and that he cannot find it, the presumption that the will was revoked is overcome, notwithstanding that a person benefited by its revocation testified that the testatrix threw the will in the stove with intent to destroy it, and especially where the witness so testifying had an opportunity to have taken it surreptitiously from the lawyer's desk: *Hildreth v. Schillenger*, 10 N. J. Eq. 196. But where the will had been drawn nine years previously and placed in the safe of the subscribing witness, who did not remember when he had last seen it, but the business partner of the witness was an intimate friend of the testator, and the testator had frequently called at the business place of the witness, and it also appeared that the testator, several years prior to his death, had drawn another will which was a substantial copy of the earlier will, but had afterward obliterated the name of a devisee, and his own name, and the names of the subscribing witnesses, it was held to be insufficient to establish the lost will: *Keesy v. Simon*, 91 Hun, 642, 37 N. Y. Supp. 92.

Where a subscribing witness witnessed testator's will a few years before his death, in the presence of two other witnesses, the wife and a son of the testator, and the testator, several days before his death, had the will brought from a desk, where he kept his valuable papers, for the purpose of giving it to one of his sons for safekeeping, but changed his mind and returned the will to the desk, and his

widow testifies to having seen the will the day after testator's death, the evidence is sufficient to show that the will was in existence at the time of his death: *Bailey v. Stiles*, 2 N. J. Eq. 220. Evidence that an alleged witness to a lost will stated at the testator's funeral that he had the will in his pocket does not tend to prove that such was the case, there being no evidence that anyone ever saw it in his possession: *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248. Proof that a month before his death testator told a witness that he had made a will, that his daughter was his housekeeper, and had an interest in destroying the will, and that three days after his death his will was not to be found, is not sufficient evidence to authorize the submission whether the will was in existence at the death of the testator: *Knapp v. Knapp*, 10 N. Y. 276. But where a will executed in March, 1895, was seen in testatrix's possession, in January, 1898, and the envelope containing the will was seen in a closet where testatrix kept valuable papers, on June 11, 1898, but was not seen again, and the testatrix died on the thirty-first day of July, 1898, the presumption arises that it was destroyed *animo revocandi*: *In re Kennedy's Will*, 53 App. Div. 105, 65 N. Y. Supp. 879.

Proof of Contents of Lost or Destroyed Will.—Upon proof that a will has been lost, its contents may ordinarily be shown by parol in the same way as the contents of any other lost instrument: *Butler v. Butler*, 5 Harr. 178; *Muller v. Muller*, 108 Ky. 511, 56 S. W. 802; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393; *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719; *Brinker v. Brinker*, 7 Pa. 53; *McNeely v. Pearson* (Tenn. Ch.), 42 S. W. 165.

Whether the contents of an alleged lost will can be proved solely by the declarations of the testator is doubtful, but the fact that such declarations are admissible in connection with other evidence is quite well established: Monographic note to *In re Colbert's Estate*, 107 Am. St. Rep. 469.

In some of the states, however, the statutes require the provisions of lost or destroyed wills to be established by two credible witnesses.

How Much of Will must be Proved.—Several courts have held that where the entire contents of the lost or destroyed will cannot be proved, probate may be granted to the extent to which the contents are proved: *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110; *Steele v. Price*, 5 B. Mon. 58; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Sugden v. Lord St. Leonards*, [1876] L. R. 1 P. D. 154.

But we think that the rule announced by the court in *Butler v. Butler*, 5 Harr. 178, is the safer rule. The court said: "In order to establish a last will and testament, which has been lost or destroyed, the same formalities and rules of law must be observed as are applicable to other lost or destroyed instruments; for I know of no reason founded either in the policy of the law or any facts arising from any peculiar circumstances attending such cases, to make them

exceptions to the general rules which are so well settled and established as to all other cases.

"First, then, the existence of the instrument in a legal form must be proved; secondly, its loss or destruction; and thirdly, its contents. Nothing short of this will satisfy the requirements of the law which governs all cases of this sort; therefore, proving part only of the contents of a will which is lost or destroyed is not sufficient to establish it, even as to the part so proved, unless it satisfactorily appears that there is nothing in the preceding or subsequent part of the will which would qualify, change, or in any way alter the particular devise proved; for without knowing the certainty of the will and the language used by the testator, it would be impossible to determine what estate would pass under it. The words of the particular devise, which may be attempted to be established, might convey a fee simple; yet something might precede or follow which would reduce it to a life estate, or subject it to some other restriction or limitation; or the words of the devise might create but a life estate, which by the preceding and subsequent part of the will might be enlarged and extended to a fee simple; and either an estate in fee simple, for life or for years, might depend entirely upon some contingencies, limitations, or restrictions imposed by some subsequent part of the will."

The observations of the court in *Davis v. Sigourney*, 8 Met. 487, were also to the same effect. In *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873, it was observed that any clause of a lost will which is complete in itself and independent of other provisions of the will may be admitted to probate, although other provisions cannot be proved, but it must be apparent that the unproved provisions cannot affect the provisions which are proved.

The probate of a lost or destroyed will is authorized where the evidence clearly establishes such part, though it does not disclose all the other parts, if the will has been fraudulently destroyed after the death of the decedent by her husband or other persons against whose interest the probate of the will is sought: *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812.

In *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 157, the court decided that the contents of a lost will must be shown to such an extent as is necessary to establish a revocation of any former will by implication where no express revocation is shown, and that such revocation must be shown by clear, unequivocal and convincing evidence.

Code provisions relating to the proof of the provisions of a lost will apply only to those provisions which affect the disposition of property, and are of the substance of the will; hence the failure of the witnesses to agree as to whether a certain person or any person was appointed executor is not such a portion as affects the disposition of the property: *Early v. Early*, 5 Redf. Sur. 376.

Sufficiency of Proof if Only the Substance of the Will be Shown.—

It is sufficient if the substance of a lost or destroyed will be proved without proving the precise language employed in the will: *Allison's Devises v. Allison's Heirs*, 7 Dana, 90; *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812. In *Estate of Camp*, 134 Cal. 233, 66 Pac. 227, the court said: "If their testimony respecting the contents of the lost portion of the will coincides as to the provisions therein made by the testator, the court is authorized to establish such provisions as a portion of the will, even though the witnesses may differ as to their remembrance of the exact language used by the testator. Thornton, in his treatise on Lost Wills, says (section 108): 'It is enough to prove the substance of the will without proving the precise statement of the language or terms used in it.'"

"In *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812, that court said, with reference to the sufficiency of the petition: 'To require that a copy of the will, or the language of the bequests in detail, should be pleaded, where no copy has been preserved, and where the memory of witnesses does not hold the exact words, would not only deny the substance for mere form, but would offer a premium upon the rascality of one whose interests might suggest the destruction of the will'; and in answer to the contention that the findings must establish the exact words of the will, said: 'We have said, upon the demurrer to the complaint, that the substance is sufficient where the exact words cannot be established, and more certainty in findings cannot be required than is required in pleading or in evidence': See, also, *McNally v. Brown*, 51 Redf. 273. In jurisdictions where the contents of a lost will may be proved by a single witness, it is held that such witness is not required to repeat the exact language of the instrument: *Anderson v. Irwin*, 101 Ill. 411; *Burls v. Burls*, L. R. 1 P. D. 472. A notable case in which this rule was applied was that of the will of Sir Edward Sugden: *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154. Under the reason of this rule, a different remembrance of the exact language of the will by different witnesses would not take away the right to have the provisions of the will established, which are supported by the language told by each of them, and are consistent therewith.

"The testimony of each of the witnesses herein was to the effect that the disposition of his property made by the testator in the missing portion of his will was in favor of his wife during her lifetime, and for their children after her death. The testimony of the witness Bonham was more concise than that of McQuiddy, and the finding of the court corresponds more closely to this; but, although McQuiddy does not give the same language as does Bonham, and himself states the same in different forms, there is no contradiction between them as to the substance of the testator's provision for this disposition of his property. The property disposed of, the persons in whose favor the disposition was made, and the extent of the disposition in favor of these persons, were the same."

Under a code provision that the will shall be "clearly and distinctly proved by at least two credible witnesses," the witnesses need not be able to testify to the exact language of the lost will, but they must be able to testify to the substance of the whole will, so that it may be incorporated in the decree should the will be admitted to probate: *McNally v. Brown*, 5 Redf. Sur. 372.

Discrepancy in Evidence as to Contents of Will.—Two witnesses need not concur in their evidence as to the entire contents of an alleged lost or destroyed will, so that the instrument can be reproduced in writing and written out at full length upon the probate records. It is sufficient that they agree as to the substance of the provisions conferring some property rights upon the devisees or legatees: *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812.

But where there are four or five witnesses, no two of whom agree as to the entire contents of the will, and all, or nearly all, of whom affirm their recollection to be indistinct and imperfect, there is not that degree of proof which convinces the mind and satisfies the judgment as to what the contents of the lost will were: *Rhodes v. Vinson*, 9 Gill. 169, 52 Am. Dec. 685. And where four witnesses testify to having read the lost will three years before, and three of them testify that the devise was to the heirs of the testator's mother, while the other witness testifies that it was to the mother "and" her heirs, and the testator, who was a lawyer, was his mother's only heir, and the mother was dead when the will was executed, it was held that the provisions of the will were not clearly and distinctly proved by two credible witnesses: *In re Purdy's Will*, 25 Misc. Rep. 458, 55 N. Y. Supp. 644.

Evidence of Scrivener as to Contents Given in Alternative.—Where the lawyer who drew the will testifies that the lost will either gave the whole estate to the wife absolutely or that it gave it to her for life with remainder to her children, but he could not testify which, but thought that it gave the whole estate to the wife absolutely, the testimony lacks the statutory elements of clearness and distinctiveness: *Matter of Ruser*, 6 Dem. Sur. 31.

Evidence of Impression of Contents Without Positive Recollection. Where a witness who had drawn three or more wills for the testator simply had an impression, but no positive recollection of drawing a will subsequent to the one offered for probate, and could not fix its date, or state whether it was attested, or the names of the witnesses to it, or tell which will he followed out of several wills shown him, the evidence is insufficient to show that a lost will was executed revoking former wills: *West v. West*, 144 Mo. 119, 46 S. W. 139.

So, also, in *Davis v. Sigourney*, 8 Met. 487, the question also arose. The facts as stated by the court were as follows: "The witness, having in his possession the will of 1834, a rough draft of the will of 1837, and the will drawn by him in 1840, undertakes, from these materials, and from his recollection, to testify as to the contents of

the will of 1837, and the codicil or codicils thereto, according to a copy of the substance thereof prepared by him. By this copy, it appears that there was bequeathed to the testator's two unmarried daughters the sum of fifteen hundred dollars each. The witness testifies that he thinks that was the sum; and when interrogated how clear was his recollection, he answers: 'If I have any doubt, it is a very slight one, and I do not wish to be any more confident than I have already expressed.' He also testifies that there may have been some slight alterations between the will of 1837 and the rough draft; but he does not remember any. He says it was mainly so; and when asked whether it differed in any point, he answers, 'I do not remember at this moment that it did, but I cannot be positive.' He testifies that the rough draft was an outline prepared to be shown to the testator, and if he should have made any suggestion of an alteration, it would, of course, have been made. The witness is equally uncertain to what extent he followed the will of 1837, and the codicil or codicils, in making the will of 1840.

"In the will of 1834 the devises to the daughters of their shares in the real estate were in fee simple; whereas, in the will proved in the probate court, the shares of the daughters are given to them for life, with remainder to their descendants. And as to this alteration, Mr. Simmons testifies that he does not distinctly remember that it was made by the direction of the testator, though he had no doubt that it was.

"Upon such doubtful evidence, the court cannot feel justified in confirming the decree of the judge of probate establishing this will. To authorize the probate of a lost will, by parol proof of its contents, depending on the recollection of witnesses, the evidence must be strong, positive and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act upon probabilities."

Proof of Contents Where Will Fraudulently Destroyed.—Where one destroys a will or connives at its destruction, in a contest between the spoliator and an innocent party, the latter is only required to show in general terms the disposition which the testator made of his property, and is not required to produce as high a degree of proof as in a case where the circumstances of spoliation does not occur: *Anderson v. Irwin*, 101 Ill. 411; *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223.

Witness Who Only Heard Will Read or Who had Read Only a Part of It.—Testimony of a clerk in the lawyer's office, who heard the scrivener read the will in the presence of the testator at the time of its execution is hearsay relating to the scrivener's declarations: *Colligan v. McKernan*, 2 Dem. Sur. 421. And testimony as to the contents of a lost will by a witness who has not inspected it but merely heard the testator read it, has been rejected as being in effect only

testimony as to the declarations of the testator: *Clark v. Turner*, 50 Neb. 290, 33 L. R. A. 433, 69 N. W. 843. Testimony by a witness who did not read the whole will or otherwise know its contents is of no appreciable value: *Matter of Buser*, 6 Dem. Sur. 31.

In *Morris v. Swaney*, 7 Heisk. 591, the court, in discussing the value of evidence by a person who only heard the will read, said: "There is no doubt that the knowledge of a witness who only hears a paper read is not of as high a character as that of a witness who reads himself, for the witness who hears it read cannot know that it is correctly read to him. Still his evidence must be admissible. How satisfactory it will be depends upon other circumstances.

"It cannot be upon principle that the evidence of the contents of a paper must necessarily be derived from a reading by the witness. Records may be proved by an examined copy; that is, by producing a witness who has compared the copy with the original, or with what the officers of the court, or any other person, reads as the contents of the record. It is not necessary for the persons examining to exchange papers, and read alternately both ways: 1 Greenleaf on Evidence, sec. 508. This shows that the reading by another party may be the means by which the witness obtains a knowledge of the contents of the paper."

Use of Copy or Draft in Proving the Contents.—Probate of a lost or destroyed will may be had upon proof of its contents by a copy of the original will, since the copy constitutes, under such circumstances, the best evidence in the power of the party seeking the probate of the lost will: *In re Happy's Will*, 4 Bibb, 553; *Graham v. O'Fallon*, 3 Mo. 507; *Spencer v. Spencer*, 1 Gall, 622, Fed. Cas. No. 13,233.

Under the New York statutes a correct copy or draft of a lost or destroyed will is equivalent to one witness: *In re Granacher's Will*, 74 App. Div. 567, 77 N. Y. Supp. 748, affirmed in 174 N. Y. 504, 66 N. E. 1109. Hence where the scrivener produces the draft of the will which was engrossed by his clerk, and after being so engrossed was executed by the testator, the draft may be treated as a substitute for one of the witnesses required by the statute: *Collyer v. Collyer*, 4 Dem. Sur. 53.

But where the proponent fails to establish the correctness of a copy proposed for probate, the failure may be considered in determining the credibility of the parol evidence to establish the will: *Jaques v. Horton*, 76 Ala. 238.

Incomplete Copy or Draft Showing that Certain Clauses were Altered.—The fact that the lost will contained a clause not in the copy offered in evidence, to the effect that the husband of the testatrix should be executor, will not prevent the probate of the copy where it is shown that the husband died prior to the testatrix: *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873. Where a draft of a will, after showing unmistakable disposition of the realty, had a clause directing the personal property to remain in the family for six years, and then

to be divided equally among the four younger sons, there being eight children in the family, but at the side of the clause, inclosed in brackets, are the words: "this altered," and at the foot of the writing are added the words, "must remember to divide the personal property," it was held that the true meaning of the clause was that the personal property should be divided among all of the children instead of amongst the four younger children: *Bailey v. Stiles*, 2 N. J. Eq. 220.

Pencil Draft Compared by Scrivener with Lost Will.—Where the will was accidentally destroyed by fire while in the possession of testator's attorney, a pencil copy drafted by the attorney from oral instructions given by the testator, and compared by the attorney with the original will before it was executed, the execution of the will being before the attorney and another, is sufficient to authorize the probate of the pencil copy where it is identified by the attorney who drew it: *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874.

Copy of an Olographic Will.—Where the will offered for probate was a copy of an olographic will, testimony of the person who read the copy and the person who copied it, together with the copy itself, fulfills the requirement of the code that a lost or destroyed will be "clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness": *In re De Groot*, 9 N. Y. Supp. 471.

Will Recorded at Request of Testator During Lifetime.—In proceedings to probate a will destroyed by the testator during temporary insanity, although the record of the will caused to be recorded in the recorder's office by the testator was not competent evidence as a record, still it is competent for the purpose of exhibiting a copy of the instrument, and where the copy is shown to be a true one by the testimony of one witness, it is not necessary to prove the exact contents by any other witness, provided that some other witness states in general terms the provisions of the lost will, in order to comply with the provisions of the statute requiring proof by "a correct copy and the testimony of one witness": *Forbing v. Weber*, 99 Ind. 588.

Proof of Lost Will, After Its Probate, for Use in Other Proceedings.—Presumption Arising from Loss After Probate.—Where it is shown that a will was admitted to probate before its destruction or loss, the presumption arises that it was properly executed by the testator: *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367; *Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298; *McNeely v. Pearson* (Tenn. Ch.), 42 S. W. 165.

Effect of Probate Records and Certified Copies Thereof.—After a will has been probated and recorded in a proceeding had for that purpose in the proper court, such record is *prima facie* evidence in future proceedings contesting the validity of the will: *Banning v. Banning*, 12 Ohio St. 437; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209. Consequently, where the original will has been lost, the record of the probate in the book of the judge of

the probate court is admissible in evidence: *Jackson v. Lucett*, 2 Caines, 363. And a copy of a will with letters testamentary, under the hand and seal of a deputy commissary, is admissible in evidence upon proof that diligent search has been made for the original: *Smith v. Steele*, 1 Har. & McH. 419. And where a witness testified to the contents of a lost will, and the records of a county court show how the lands in controversy were devised by the will, and the heirs and devisees had for forty years acquiesced in the use of the land under the devise as shown by the records, the court will hold that the contents were shown by clear and convincing testimony: *McNeely v. Pearson* (Tenn. Ch.), 42 S. W. 165. But where the record of the probate court merely shows that the will was probated, but does not show its contents, and the will was not recorded, and the testimony of witnesses claiming knowledge of its contents vary as to the contents, no two witnesses agreeing to the substance of the important dispositions, the evidence is insufficient to establish the contents of the will: *Nunn v. Lynch*, 73 Ark. 20, 83 S. W. 316.

Effect of Statute Requiring Two Witnesses to Prove Lost Will.—Under the statutes of New York, requiring the contents of a lost or destroyed will to be proved by two credible witnesses, the court has held that the provision only applies to proceedings for the purpose of probating the will, and not to other proceedings in which it is necessary to prove the contents of a lost or destroyed will: *Harris v. Harris*, 26 N. Y. 433.

Proof Where the Probate Records have been Destroyed.—The manner in which a will lost or destroyed by a great conflagration may be proved where the will had been probated and made a matter of record is shown by the case of *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367. Inasmuch as the opinion of the court discusses both the facts and law, we will quote the portion of the opinion relative to the subject in detail. The court, in discussing the subject, said: "Did John E. Weber die testate? The complainant in the original bill, Louis P. Kotz, alleges that John E. Weber died intestate, while all the other appellants except Louis P. Kotz charge in their answers to the cross-bill that John E. Weber died leaving a last will and testament. To sustain the cross-bill, defendants called Henry H. Handy as a witness. He testified he had been an abstractor in the city of Chicago for thirty-seven years, and the custodian of all the abstract books saved from destruction in the great Chicago fire in 1871. He stated there were minutes upon the books of original entry that the estate of John E. Weber was indexed in the estate book of Chase Bros. as pending in the county court of Cook county at the time of the fire; that in other books of original entry of Chase Bros. it appeared that the will of John E. Weber, as document No. 76,413 was recorded in the recorder's office; that by the books of Jones & Sellers, another abstract firm, the will of John E. Weber, dated January 27, 1864, was recorded February 24, 1864, in volume 264, page 32, in the recorder's office of Cook county, as document No. 76,413, thus supplementing and

confirming the memoranda taken from the books of Chase Bros. The evidence further shows that John E. Weber died February 18, 1864; that the will was made January 27, 1864 (about three weeks before his death), and was recorded February 24th—which, taken in connection with the estate book of Chase Bros., can lead to no other reasonable conclusion than that the estate of Weber was pending in the county court of Cook county, and that it must have been probated in the county court and a certified copy recorded in the recorder's office of Cook county. Sections 23 and 24 of chapter 116 (3 Starr & Curtis' Annotated Statutes, second edition, page 3360), entitled 'Lost or Destroyed Records,' provide, in brief, that upon the trial of any suit or proceeding pending in any court of this state, when it shall appear orally in court or by affidavit that the original of any deed or other instrument in writing is lost or destroyed, etc., the court shall receive as evidence any copy, extracts, or minutes from such destroyed records, or from the original thereof. The witness explained the abbreviations and dates, their meaning, etc. This kind of testimony was properly admitted. This court said in *Converse v. Wead*, 142 Ill. 132, 31 N. E. 314: 'A witness who was familiar with the system of entries and making of abstracts by the abstract-makers, and knew their rules and had worked with their men before the fire, and had assisted them daily in taking off minutes of the deeds from the records, swore as to these abbreviations,' etc. In *Smith v. Stevens*, 82 Ill. 554, this court said, with reference to the burned records act: 'The condition of property owners in Chicago after the great fire of October, 1871, was appalling, demanding legislative interference. A great evil had befallen them, which this act was designed to remedy. It is emphatically a remedial act, and, in accordance with a well-established canon, it must receive a liberal construction, and be made to apply to all cases which, by a fair construction of its terms, it can be made to reach.' Certainly a will relating to the title of real estate must be held to come within the scope of this remedial statute. Another witness—Fernando Jones—who had been engaged in the business of making abstracts of title to real estate in Cook county forty years, and prior to October, 1871, under the name of Fernando Jones & Co., and afterward, under the name of Jones & Sellers, testified he knew John E. Weber and remembered his sickness and death; that he saw him during his last illness; and that there was an estate of John E. Weber in the probate court, and that he had a will, and that the will was recorded in the recorder's office. These facts establish beyond question that John E. Weber died testate, and that his will was admitted to probate in Cook county; and that there is nothing in the record tending to prove the allegations of complainants that he died intestate."

So, also, where a will had been admitted to probate, recorded, deposited with the proper officer for safekeeping, and the public office containing the will and the records was destroyed by fire, a certified copy of the will which has been acted upon by the parties inter-

ested for years has been regarded as sufficient proof, the court observing: "It would be a severe rule which would work great mischief to the citizens to ask higher proof than this": *Franklin v. Creyon*, Harp. Eq. (S. C.) 243. And where a bill based on an alleged will is filed after a lapse of fifty years after the destruction of the records in the clerk's office through a fire, it will be dismissed where the testimony respecting the lost will is inconsistent and uncertain: *Todd's Heirs v. Wickliffe*, 12 B. Mon. 289.

In *Smith v. Carter*, 3 Rand. 167, a will which was probated was destroyed, together with all the records by a fire during the war of the Revolution, but the court allowed parol proof of its contents on the ground that it was the best evidence that the nature of the case afforded.

Where the original will and the record-books in which it was recorded were destroyed by Sherman's raid during the Civil War, and a certified copy of the original will was afterward recorded, and the book in which it was recorded was accepted by the bar and citizens of the county as containing the best attainable evidence of the records that were destroyed by the raid, and the executor of the will acted under the recorded copy of the will, the court will regard the recorded copy as a true copy of the destroyed will: *Howard v. Quatlebaum*, 46 S. C. 95, 24 S. E. 93.

Proceedings for the Probate of Lost or Destroyed Wills—What Courts have Jurisdiction.—Considerable diversity of opinion has existed as to whether a court of equity or a court of probate had exclusive jurisdiction of proceedings to establish lost or destroyed wills. The matter, however, is generally regulated by local statutes. The subject was extensively reviewed in *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646, and the court announced the following to be the rule in such cases: "My conclusion then is, that in the various states of the Union, chancery courts have, and ought to have, jurisdiction to set up and establish wills, which have been lost, suppressed or destroyed, except where by some peculiar provision of the statute law equity courts have in such cases concurrent jurisdiction with the chancery courts, unless their jurisdiction is so restricted by statutory law as to clearly indicate that the legislature did not design in any case to permit them to admit to probate a lost or destroyed will. These conclusions, it seems to us, are supported, not only by reason, but also by the great weight of authority."

The jurisdiction to prove a will is not lost merely because the will is lost or destroyed. The only difference between the probate of a will which can be produced and one which cannot is with respect to the nature and quantity of proof to be adduced: *McCormick v. Jernigan*, 110 N. C. 406, 14 S. E. 971. Courts of equity exercised jurisdiction of proceedings to establish lost or destroyed wills in the following cases: *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812; *Bailey v. Stiles*, 2 N. J. Eq. 220; *Buchanan v. Matlock*, 8 Humph.

390, 47 Am. Dec. 622; but such jurisdiction was denied, in *Clarke v. Clarke*, 7 R. I. 45; *Matter of Sinclair's Will*, 5 Ohio St. 290.

In the late case of *Ewing v. McIntyre*, 133 Mich. 459, 95 N. W. 540, the court, in discussing the jurisdiction of probate courts in such proceedings, said: "The jurisdiction to admit wills to probate is now quite generally conferred upon probate courts, and in other states this extends to lost and destroyed wills, in some cases depending upon statutes expressly conferring such jurisdiction; in others, under general statutes authorizing the probate of wills and administration of estates. We are of the opinion that the weight of authority sustains the jurisdiction under such general statutes, notwithstanding the case of *Buchanan v. Matlock*, 8 Humph. 390, 47 Am. Dec. 622, which holds the contrary: *Morningstar v. Selby*, 15 Ohio, 345, 45 Am. Dec. 579; *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Gaines v. Hennen*, 24 How. 553, 16 L. Ed. 770; *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 192; *Clark v. Wright*, 3 Pick. 67; *Davis v. Sigourney*, 8 Met. 487; *Happy's Will*, 4 Bibb, 553; *Graham v. O'Fallon*, 3 Mo. 507; *Apperson v. Cottrell*, 3 Port. 51, 29 Am. Dec. 239; *Thornlin on Lost Wills*, secs. 5, 6, where the above cases are reviewed. Extended discussions of the subject will be found in several of these cases, especially *Adams v. Adams*, 22 Vt. 50, and *Dower v. Seeds*, 28 W. Va. 113, 139, 143, 57 Am. Rep. 646. In Michigan the statute confers in general language upon probate courts authority to probate wills and settle estates: *Comp. Laws*, secs. 650, 651. In *Lloyd v. Wayne*, Circuit Judge, 56 Mich. 243, 56 Am. Rep. 378, 23 N. W. 28, 31, Mr. Justice Campbell says: 'There never has been any proceeding known to our laws for the mere purpose of establishing the will even of a deceased person. The probate of wills under our statutes is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of such estates. This rule is so general that in some states devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately.' "

As a general rule, courts of equity have disclaimed jurisdiction over the probate of wills: *Monographic note to Froebrieh v. Lane*, 106 Am. St. Rep. 643.

Right of Action and Parties to Proceeding.—If, upon the face of the will propounded, the proponent has a probable interest in its establishment, he may maintain the action: *Donlon v. Kimball*, 61 App. Div. 31, 70 N. Y. Supp. 252. A petition to prove the existence of a lost will may be filed without first attacking and setting aside the proceedings whereby the succession of the testator had been administered and closed and the property divided amongst the heirs at law: *In re Sprowl's Will*, 109 La. 352, 33 South. 365.

The legatees, devisees and the heirs at law are all proper parties to a proceeding to establish a lost or destroyed will: *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12.

Matters Relating to Form of Proceeding or Petition.—Proceedings to establish a prior will alleged to have been fraudulently destroyed and to set aside a subsequent will are properly joined: *Bowen v. Idley*, 6 Paige Ch. 46. A petition for the probate of a lost will which alleges that the heirs of the testatrix after her death knowingly and fraudulently burned and destroyed her will sufficiently avers that it was in existence at the time of her decease: *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812. The question whether a will was in existence at the date of the testator's death or not is one of fact: *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393.

Manner of Examining Witnesses and Their Right to Refresh Memory.—The mere fact that a witness testifying to the execution and contents of a will instead of reciting its provisions stated that they were the same as those contained in a copy which was shown him, is not objectionable where this method of examination of the witness was not objected to: *In re Granacher's Will*, 74 App. Div. 567, 77 N. Y. Supp. 748.

And where an attorney who drew the will uniformly used a form book in drawing wills of the character of the one in issue, he may use such form book in connection with memoranda given him by the testator, to refresh his memory in testifying to the contents of the lost will: *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194.

But a subscribing witness testifying to the contents of the lost will is not entitled to refresh his memory during his examination as a witness from a copy of the will, which is not known or recognized by him nor verified as a true copy of the will: *Jaques v. Horton*, 76 Ala. 238.

Right of Distant Heir to Appeal.—Where, at the time a copy of a lost will was admitted to probate, an heir was living in a mountainous district of a distant state, where she could not get legal advice and was ignorant of her rights, it was held that it was an abuse of discretion in the circuit court not to allow an appeal from the order admitting the will to probate within a year thereafter: *Jamison v. Snyder*, 79 Wis. 286, 48 N. W. 261.

ESTATE OF DRESEL, MINORS.

[No. 14,842; decided March 30, 1900.]

Guardian—Application for Reduction of Bond.—The application of the guardian in this case for a reduction of his bond was granted by the court.

Application by guardian for a reduction of his bond.

COFFEY, J. Gustave Dresel, guardian of the persons and estates of the above-named minors, having heretofore filed his petition for a reduction of the amount of the bonds to be given by him as such guardian of the persons and estates of said minors, respectively; and it appearing to the court that the amount of the bonds required to be given by said petition by order of this court made on the second day of November, 1899, is burdensome and excessive, and that the same may be reduced without injury to the interests of said minors or either of them or of any other persons interested in the matter of said estate and guardianship; and it further appearing that said petitioner, as guardian, consents that the property of said estate, consisting of moneys on deposit in the following named banks may remain on deposit with such banks, to wit, in the San Francisco Savings Union and the German Savings and Loan Society of San Francisco,—it is now ordered by the court, that said petitioner, who has heretofore been appointed guardian as aforesaid, allow said funds to remain on deposit in said savings banks, to be drawn upon only upon the order of this court to said savings banks.

And it is further ordered, that the amount of the bonds ordered to be given by the said petitioner be reduced from the sum of \$54,500 to the sum of \$2,500, to each of said minors, and that said petitioner, as such guardian, do file bonds in this court to each of said minors in the sum of \$2,500.

ESTATE OF FAATENI SWEET, DECEASED.

[No. 8189; decided August 2, 1893.]

Pleading.—Amendment to Pleadings Should be Allowed with great liberality; but an amendment is not permissible which affects a radical change in the cause of action and substitutes new issues already tendered and made by the opposite party.

Pleading.—Amendment to a Pleading is a Correction of an error committed in the progress of a cause. It is to correct, to improve, to rectify something deficient or defective in the original, not to substitute new for old. The principle to be regarded is, that where the effect of the proposed "amendment" is to state a proposition contrary to the position assumed in the original pleading, or to the theory upon which the case has been tried or the litigation conducted, then it is not an amendment.

Motion to amend pleading.

P. F. Dunne and J. J. Dunne, for motion.

T. J. Lyons and Geo. B. Merrill, contra.

COFFEY, J. Recollecting the indulgence which the law allows in the way of amendment to pleadings, the power of the court should be freely and liberally exercised in the interest of justice, and recognizing the fact that from various causes pleadings are often found defective in the course of a controversy in court, in such cases, when an offer to amend is made at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality. The right to have the pleadings amended to conform to the proof is, of course, well settled at any point before judgment; but after trial amendments should be considered with great caution. This is the pith of the law on this subject.

The objection to the proposed amendments is threefold: 1. It involves an entire change of issue; 2. It substitutes new issues; 3. It presents a new cause of action. Any one of these objections is good enough—if, indeed, the three are not one.

Cause of action is an expression peculiar to common-law system. It did not exist in equity. The expression derived its origin from the distinct and peculiar forms of procedure

appropriate to the particular classification into which common law procedure was divided. Under this system each particular form of common-law right, or common-law remedy, had to be separately asserted. The distinctive feature of the system was, in each instance, to reduce the controversy to a single issue for the determination of the jury. The right of venue materially affected the question; hence, in each action, the ground of complaint was called the cause of action, and from the cause alleged no departure was permitted, and when the proceeding had been instituted for assertion of one cause of action, it could not be used for the assertion of another distinct and independent cause of action; hence the rule that a plaintiff cannot, by amendment, introduce a new cause of action into a case.

An amendment is the correction of an error committed in the progress of a cause. It is to correct, to improve, to rectify something deficient or defective in the original, not to substitute new for old. The principle to be regarded is, that where the effect of the proposed "amendment" is to state a proposition contrary to the position assumed in the original pleading, or to the theory upon which the case has been tried or the litigation conducted, then it is not, in the sense of the statute, an amendment.

I am of opinion that the proposed amendments are designed to effect a radical change in the cause of action on the part of Israel Sweet; to substitute new issues for those already tendered and met by the opposite party; to change entirely the issues originally settled; and that to allow them would be in derogation of justice and an abuse of judicial discretion.

ESTATE OF FAATENI SWEET, DECEASED.

[No. 8189; decided August 3, 1893.]

Succession—Conflict of Laws.—The law of the domicile of a deceased person governs the succession to his personal property.

Marriage Contract—Conflict of Laws.—A marriage contract is to be construed according to the law where it is made and executed.

Marriage Contract—Conflict of Laws.—The whole of the foreign law is adopted in a marriage contract under the *lex loci contractus*, except the remedy, and the actual intention is to be interpreted according to that law.

Domicile is the Place Whence a Person Goes for Labor or Other temporary purpose and whither he returns in season of repose. It is the place where a person has his home, or his principal home, or where he has his family residence and personal place of business; that residence from which there is no present intention to remove or to which there is a general intention to return.

Domicile.—The Acts and Conduct of a Person are more conclusive in determining his domicile than are his declarations.

Application for distribution.

T. J. Lyons and Geo. B. Merrill, for next of kin.

P. F. Dunne, J. J. Dunne and H. C. McPike, for Israel Sweet, surviving husband.

COFFEY, J. This controversy is most interesting and intricate, and it has been conducted with consummate ability by respective counsel. Their arguments were not only long, but learned, and their pleadings and briefs have been of great service to the court by reason of their speaking fully to every point of the discussion.

It would be difficult to conceive how counsel on either side could more exhaustively explore the domain of legal learning pertinent to the issues involved in the cause, and although the zeal and ardor of some of them have been tempered by a tinge of asperity, their efforts on the whole will without doubt tend ultimately to the securement of exact justice—the end of all litigation.

There are three propositions presented on the part of the alleged next of kin: 1. The marriage contract and its effect

and rule; 2. The *lex loci contractus* and its application; 3. The *lex domicilii* governing succession to personality.

A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made: Civ. Code, sec. 1646.

I am of opinion that the marriage contract rules this case, and provides for the succession to the estate; that it determines the mutual relations of the parties to it; and that from the point of view of French law which was dominant Israel Sweet had no right to the succession of his deceased wife. The natural legal presumption is that the marriage contract takes the place of the law. It establishes the condition of the parties to it. It is their agreed condition. The question of succession belongs to the forum of domicile.

"The law of the domicile of a deceased person governs the succession to his personal property."

A marriage contract is to be construed according to the law where it is to be made and is to be executed.

The real intention of the parties is to be sought. Common sense furnishes a rule of interpretation—and that which is repugnant to such a rule should be rejected.—These are abstractions and need application. The whole of the foreign law is adopted into the contract under the *lex loci contractus*, except the remedy, and the actual intention is to be interpreted according to that law; the law of the place where the marriage contract was executed governs; and this case is controlled entirely by the marriage contract, and Israel Sweet was and is bound by the specifications of that contract to which he was and is a party.

As to the domicile of Israel Sweet—I do not think it has been disturbed by the very ingenious argument of his counsel, and to that argument I paid close attention in its oral presentation, and have read with great care and, I trust, intelligent interest, their admirable memorandum of points and authorities (one hundred and twenty-two pages), so clearly and logically setting forth their views.

While I feel constrained to disagree with counsel for the surviving husband, in my final survey of the situation, candor compels me to confess that for a time I was almost persuaded

to agree with them; and, perhaps now, it is my limited intelligence and my incapacity to take more than a finite view of things terrestrial, that causes me to differ from their conclusions; but I cannot refrain from alluding to the scientific manner in which they have presented their case—so satisfactory to a judge who is necessitated to take so many matters under advisement; and this is said with the due credit and distinction to the opposing counsel whose labor and learning deserve recognition.

I am of opinion that Israel Sweet's domicile, as determined by his conduct, was in Tahiti; "actions speak louder than words"; he left Connecticut in 1849 and never again set foot on the shores of the Sound—never returned to that state; going to the Pacific Islands as early as that year. He may have had "a floating intention to return," but that does not count, according to authority, as to domicile. What is *domicile*? The best and most concise definition we have met with is: The place whence a person goes for labor or other temporary purpose and whither he returns in seasons of repose. The dictionaries agree that, in law, it is the place where a person has his home, or his principal home, or where he has his family residence and personal place of business; that residence from which there is no present intention to remove or to which there is a general intention to return.

Our own Political Code, section 52, furnishes a rule and definition.

Israel Sweet's conduct as affecting his domicile is important to be considered. His acts were and are more conclusive than his declarations; his present claim is inconsistent with his past conduct. There is no evidence that he ever from 1880 to 1888 declared any intention to change his domicile from Tahiti. During eight years he never indicated an inclination to change his abode. It is clear that until the death of his wife, Faateni, he held to the purpose of retaining his residence in the islands; he cannot fix his domicile by a declaration after the fact. In 1882 he made a lease for twenty years, yet he now pretends that he had intended to leave in 1880; his acts and those of his wife were all indicative of domicile in Tahiti. The finding of the court in Tahiti that Sweet was domiciled there, No-

vember 26, 1887, is worthy of weight—if not conclusive and unassailable. It seems to fix that fact upon that date.

In considering Sweet's testimony as to the lease, it is hard to understand why a man should take so long a lease in a place where he did not intend to locate his domicile; his explanation is far from satisfactory. All the facts show, it seems to me, that he had selected Tahiti as his domicile.

I am of opinion that the persons here claiming to be next of kin have established their right in that regard, by ample evidence, deposition and record, and are entitled to judgment as prayed for in their original and supplemental petitions for distribution of the estate to the exclusion of Israel Sweet, surviving husband and petitioner herein; and that the contention of counsel for next of kin as to the law applicable in the premises is sound.

Let findings and decree be drawn accordingly, and presented for settlement and signature.

GUARDIANSHIP OF IVEY AND KATIE DEISEN.

[No. 12,597; decided August 6, 1892.]

Guardians—Jurisdictional Requisites for Appointing.—The statute prescribes two jurisdictional requisites in the appointment of guardians for minors: First, the minor must have no guardian at the time application is made; and second, he must be an inhabitant or resident of the country in which the court is held.

Domicile.—"Inhabitant" and "Resident" are synonymous terms in law, and can, strictly speaking, be applied only to persons domiciled in a place with the intent there to remain.

Guardian—Appointment for Nonresident Minors.—Where minors of tender years are brought into this state for the purpose of being exhibited before the public in song and dance performances, and then taken to another state for the same purpose, the superior court, by virtue of its equity powers, has jurisdiction, although the minors are not strictly inhabitants or residents of this state, to guard their welfare by appointing a suitable person as their guardian.

F. W. Van Reynegom, for the applicant.

James H. Creely, contra.

COFFEY, J. This is an application by C. B. Holbrook, secretary of the Society for the Prevention of Cruelty to Children, for letters of guardianship of the persons of Ivey Deisen and Katie Deisen, minors. One Hadj Tahar appeared by James H. Creely, his attorney, at the hearing of the petition for letters, and objected to the granting of the same on the ground that the said minors were residents of the county of Alameda, and that therefore the superior court of the city and county of San Francisco had no jurisdiction in the premises.

From the evidence adduced at the hearing the following facts were established: The minors are Arabians, born in Palestine, and are aged eight and ten years, respectively; their father is deceased, and their mother is an Arabian by birth and is now a resident of Australia. Hadj Tahar Ben Mahommed is an Arabian sheik, the leader of a troupe of Arabian acrobatic performers connected and traveling with a circus company, and claims the right to the control and custody of the minors by virtue of an agreement with their mother, under which agreement the minors were brought from Australia to San Francisco in company with the circus troupe for the purpose of exhibiting them before the public in song and dance performances. The children first arrived in San Francisco in the early part of June, 1892. Finding that, under the laws of California, it would be an illegal act to carry out his purpose of exhibiting the minors in this state because of their tender age, Hadj Tahar placed them in the care and custody of his divorced wife, a resident of San Francisco, and left this state in company with his circus troupe. The children remained with the ex-wife of Hadj Tahar until July 15, 1892, when they were temporarily placed in the care of one Mrs. L. Johnson, a resident of Alameda county, there to remain until such time as Hadj Tahar should be ready to remove them without this state to exhibit them at the World's Fair, at Chicago, next year, and elsewhere, in connection with the circus troupe. The petitioner herein seeks to take the children from the immediate custody of their custodian in Alameda, and to remove them from the control of Hadj Tahar.

The objection to the jurisdiction of this court is based upon section 1747 of the Code of Civil Procedure of the state of

California, which reads: "The superior court of each county may appoint guardians for the persons of minors who have no guardians and who are inhabitants or residents of the county."

It will be seen from the portions of the section quoted that it impliedly prescribes two requisites for jurisdiction to attach in the appointment of guardians for minors: First, the minor must have no guardian at the time the court is invoked; and, second, the minor must be an inhabitant or resident of the county in which the court is held. In this case the facts show that the minors had no guardian at the time the petition for letters was filed.

The main question before the court, therefore, is whether they are "inhabitants" or "residents" of Alameda county or of the city and county of San Francisco.

An inhabitant, according to Bouvier (*Bouvier's Law Dictionary*), is one who has his domicile in a place, "one who has a natural fixed residence in a place." Webster defines the word as one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor.

A resident is one who has his personal presence in a fixed and permanent abode: *Bouvier's Law Dictionary*. What facts constitute a domicile of the person has been a question frequently discussed. There is no fixed or definite period of time requisite to create it. It depends on the actual or presumed intention of the party: *High, Appellant*, 2 Doug. (Mich.) 515; *Pol. Code*, sec. 52, and note to *Deering's ed.*

It will be seen from the foregoing that "inhabitant" and "resident" are synonymous terms in law, and can only be strictly applied to persons who are domiciled in a place, with the intent to remain there.

If we look to the *animo revertendi* in this matter, it clearly indicates that the children are not residents of Alameda county, as the testimony shows that their stay in that county is only temporary, the evident intention being to take them in a few months to the World's Fair, at Chicago, and elsewhere out of this state. A minor cannot acquire a residence distinct from that of his parent or guardian. In this case the mother's

residence being in Australia, the presumption is that the children are not "inhabitants" of, and have not acquired a "residence" in, California.

The parties being all before this court, and it not appearing that the superior court in another county has any better claim to jurisdiction, it would appear that the spirit of the laws of the state would be carried out by assuming jurisdiction: Code Civ. Proc., secs. 187, 1796; *In re Guardianship of Danneker*, 67 Cal. 643, 8 Pac. 514; *In re Raynor*, 74 Cal. 421, 16 Pac. 229.

This court is not excluded from jurisdiction in the exercise of this branch of its equity powers, even if it be conceded that the minors are residents of Alameda county. The mere grant by the statute of jurisdiction to the court in the county where the minors reside does not imply that it is exclusive, in the face of the constitutional provision that the superior court shall have original jurisdiction in all cases in equity, and that its process shall extend to all parts of the state. The only territorial limitation of the jurisdiction of the superior court, in the constitution of California, is that found in the provision limiting certain actions concerning real property to the county where the real estate affected by such actions is situated: Const., art. 6, sec. 5. Sections 76 and 78 of the Code of Civil Procedure follow the provisions of the constitution.

The legislature has no power to fix by law the jurisdiction of any but inferior courts: Const., art. 6, sec. 13; *Rosenberg v. Frank*, 58 Cal. 400; *Wilson v. Roach*, 4 Cal. 362.

Compare 1294, Code of Civil Procedure, with 1747 of the same code, and it will be seen that while the provisions of the former are mandatory as to jurisdiction, those of the latter section are only so by implication. There is no implication or presumption against the jurisdiction of a superior court. To treat section 1747 as imposing a limitation on the jurisdiction of the superior court would make it inconsistent with the provisions of sections 76 and 78, above cited. The reasonable construction, therefore, of section 1747 would appear to be that it is merely directory. If the courts of Alameda and San Francisco have equal rights

of jurisdiction in the premises, the jurisdiction of the court first attaching or acquired is exclusive: Code Civ. Proc., sec. 1796; Guardianship of Danneker, 67 Cal. 643, 8 Pac. 514.

Accepting these views of the law, as presented by the learned counsel for the Society for the Prevention of Cruelty to Children, and upon the facts in proof on the trial, the opposition of Hadj Tahar is overruled and the application of C. B. Holbrook for letters of guardianship is granted.

One of the First Jurisdictional Requisites to the appointment of a guardian for a minor is that the child must be an inhabitant or resident of the county in which the appointment is made: *In re Raynor*, 74 Cal. 421, 16 Pac. 229; *Estate of Taylor*, 131 Cal. 180, 63 Pac. 345. It has been affirmed that a court has no authority to appoint a guardian for infants absent from the state, although their domicile is within it: *De La Montanya v. De La Montanya*, 112 Cal. 131, 44 Pac. 354.

ESTATE OF WILLIAM P. FULLER, DECEASED.

[No. 9747; decided March 12, 1891.]

Executor's Sale—Confirmation When Sale Made Under Power.—The superior court, sitting in probate, has jurisdiction of an application to confirm a sale of a partnership interest made by an executrix under a power given in the will.

Executor's Sale—Restraining Confirmation.—One department of the superior court sitting in equity cannot, by enjoining parties to an executor's sale, prevent another department of that court sitting in probate from confirming such sale.

Executor's Sale.—It is No Answer to an Application to Confirm a sale of a partnership interest, made by an executor under a power in the will, that there was a contract between the decedent and his surviving partner to sell the decedent's interest to the surviving partner.

William P. Fuller died on May 17, 1890, leaving a widow and a number of children. He left a will in which the widow was named as executrix, and which conferred upon her a power of sale.

At the time of his death William P. Fuller was a member of the firm of Whittier, Fuller & Co., which firm was com-

posed of William F. Whittier, William P. Fuller, F. N. Woods and William P. Fuller, Jr.

The will was admitted to probate, and Margaret H. Fuller, the testator's widow, was appointed the executrix thereof. Timothy J. Lyons was appointed by the court as attorney to represent the minor children.

On February 24, 1891, the executrix reported to the court that she had sold the partnership interest of the decedent in the firm of Whittier, Fuller & Co. for \$1,400,000 to William P. Fuller, Jr. With this report was a petition for the confirmation of the sale. The hearing of the petition for confirmation was set for March 9, 1891, and notice was directed to be given to all parties interested, and citations issued to the three surviving partners to be examined as provided in section 1524 of the Code of Civil Procedure. At the time set for the hearing the same was continued, without objection, to March 11, 1891. On the morning of the last-named day William F. Whittier commenced a suit against the executrix and the heirs of the decedent, and the purchaser, in the superior court of San Francisco, sitting in equity, to enjoin them from in any manner proceeding with the application for confirmation of the sale of the partnership interest to William P. Fuller, Jr., and for specific performance of a contract with decedent, entitling Whittier to purchase such interest after the testator's death, the executrix having refused to carry out the contract. This suit was assigned to Department No. 6 of the court, and an order was made by the presiding judge requiring the defendants to show cause on March 20, 1891, why an injunction should not be issued as prayed for, and in the meantime restraining them from proceeding with the application for confirmation.

The Whittier suit was based upon the articles of co-partnership of Whittier, Fuller & Co., wherein it was provided, amongst other things, as follows:

"Sixteenth. In case of the death of either W. F. Whittier or W. P. Fuller during the continuance of this co-partnership, the interest of such decedent in the firm and the business thereof shall remain undivided therein until the 31st day of December next ensuing, the contributed capital of

the decedent bearing interest at the rate of five per cent. per annum until said 31st day of December, when the entire interest of such decedent in said partnership and the business thereof, consisting of his contributed capital and the accrued interest thereon, and such pro rata of the profits for the entire year as the time that the decedent was living during the year bears to the entire year, less any amounts that he may have withdrawn since the first day of January next preceding, shall be ascertained and determined; and the survivor shall be entitled to take and purchase such interest of his deceased partner in said partnership and the business thereof, and without charge for the good-will of the business, for the amount so found and determined to be the value thereof, as aforesaid, giving his notes for the payment thereof, payable to the executor or administrator, or other legal representative of such decedent, in equal monthly installments, the first note being due and payable in three months from the 31st day of December, or day when such interest of the decedent shall be fixed and determined, together with interest thereon at the rate of six per cent. per annum, said interest to commence sixty days from the dates of said notes."

The contract further provided that the time of payment of the notes shall be so apportioned that the total amount of the purchase price of the deceased partner's interest shall be due and payable within five years.

Just before the application for confirmation was reached for hearing on March 11, 1891, the restraining order in the Whittier suit was served upon the attorney for the executrix, and, when the application was reached for hearing, counsel for William F. Whittier directed the attention of the court and parties present to such restraining order, and also to a petition which had been filed by William F. Whittier, objecting to the confirmation of the sale to William P. Fuller, Jr., which petition contained, amongst others, the following averments:

"That pursuant to the clause 16th of said articles of co-partnership, the interest of the said decedent in the said co-partnership and the business thereof remained undivided after his death on the 17th day of March, 1890, until the 31st

day of December next ensuing. That after the death of said Wm. P. Fuller, and from that time continuously until the present date, your petitioner intended and expected and still intends and expects to exercise his right, under clause 16th of said articles of co-partnership, of purchasing the entire interest of his said deceased partner in the said co-partnership and the business thereof, and it was during all the said time, and still is, well known to all members of said co-partnership, and especially to the said Wm. P. Fuller, Jr., that such was the intention of your petitioner. That the entire interest of said decedent in said co-partnership and the business thereof was immediately after the 31st day of December, and as soon as the same could be practically done, ascertained and determined. That owing to the magnitude of the interest involved, and the great labor of ascertaining and determining the pro rata of profits for the year 1890 to be credited to the said Wm. P. Fuller, deceased, under said clause 16th, it was not until on or about the 1st day of March, 1891, that your petitioner was prepared to carry the agreement contained in said clause into execution.

“Petitioner thereupon, to wit, on the 7th day of March, 1891, notified the said executrix in writing that he desired to exercise and did exercise his right under said clause 16th of said articles of co-partnership, and tendered to her, as such executrix, the amount of the entire interest of said decedent in said co-partnership and the business thereof, on the 31st day of December, 1890, as the same had been ascertained and determined, and offered then and there to deliver to her his promissory notes for said amount, which said notes were in substance and form as prescribed in said clause 16th, and demanded of her that she execute to him such assignment, transfer, bill of sale, or other instrument in writing, transferring and assigning said interest of said decedent in the said co-partnership and the business thereof, as should fully and finally vest the title of said interest in him; that said executrix rejected the said tender and refused to comply with the said demand. That thereafter, and on the said 7th day of March, 1891, your petitioner presented to said executrix for her approval his certain claim, in writing, duly verified, based upon said clause 16th,

for the purchase of said decedent's interest in said co-partnership and the business thereof."

The partnership interest had been appraised at \$1,320,000. The proposition of Mr. Whittier (made on March 7, 1891, after the sale had been made and reported by the executrix) was the delivery of notes, the payment of which would extend over a period of five years, for the aggregate amount of \$1,284,000—said notes to be unindorsed and unsecured.

After the attention of the court had been directed to these various matters, counsel for the objecting partner requested a postponement of the application for confirmation until the final determination of the Whittier suit. Counsel for the executrix and for the purchaser and for the adult heirs stated that they felt bound by the restraining order made in that suit, and would not proceed with the application for confirmation.

The attorney for minor heirs insisted, however, that he was not included in or bound by the restraining order, and that the hearing of the application for confirmation should be proceeded with.

After argument on the right of the attorney for minor heirs to insist on proceeding with the application, the court delivered its opinion orally as follows.

A. G. Booth, for the executrix.

Russell J. Wilson, for the adult heirs.

W. F. Herrin, for Wm. P. Fuller, Jr., the purchaser.

S. C. Denson and John H. Boalt, for Wm. F. Whittier, the objecting partner.

Timothy J. Lyons, for the minor heirs.

COFFEY, J. This is simply a matter of jurisdiction. This court has jurisdiction of the subject matter of this application. No other court is competent to enjoin this court by any such process as this. This is addressed to the parties, and they are responsible for any disobedience of the injunction to the other department. All the court here has to do is to attend to the business before it. Here is an application regular in form, and the hearing is insisted upon.

As to the injunction—why, the parties who are enjoined may proceed at their peril in the other department.

The only point is this: The matter is regularly on the calendar, and if the action of this court should be, as suggested, vain, the parties who have procured the injunction against this proceeding will suffer nothing. I am bound to hear all matters that come on here to be heard, when those who make application insist upon their rights. Mr. Lyons is not under the jurisdiction of the other court as attorney in this proceeding. That has been repeatedly held. He has no business as attorney of the minors in that other court. He might have business there if he should be appointed guardian ad litem. Here the application is before the court and all interested in the application. . . . I cannot take notice of the matter that is pending in another court. I take notice of the record as it existed at the time of the filing of this application. It is a mere accident—the clerk failed to do a ministerial duty the other day; that is the reason that you have any right in court at all this morning. Because, if the matter had been heard as the matter stood the other morning, you would not have been here with this other proposition. It is suggested on your side there is an attempt here to evade the operation of the order—of the restraining order. It might be said, on the other side, that there is an attempt to evade the jurisdiction of this court.

Mr. Lyons is the agent of the court to represent these minors. Of course he could not be employed by them, and he would not be subject to that restraining order. I don't know how far the court—the other court—will exert its power over persons not minors or not described as such. What I say—I possibly might be misunderstood by it—is that the attorney appointed by the court has no business outside of the probate department; and that has been repeatedly decided. One instance is the case with which you all are more or less remotely associated, an estate of some magnitude, the Estate of Blythe. Dr. Taylor was appointed by the court in that case and went into another department, No. 10, I think, and was not allowed to appear in the case because he had no business outside of the probate court. He was responsible to no other authority except the court that appointed him.

So in the Estate of Caroline Fisher: 1 Cof. Pro. Dec. 97. I refused to allow an attorney appointed in that way for services rendered by him in a litigation in another department, because he had no business there. He was only an incident of administration. As he can act nowhere else than in the probate department, he is constantly liable to be called upon for his acts and is amenable to the probate department in his capacity as attorney for minor heirs; and is amenable to no other department.

This proceeding was not instituted by him. He is appearing here in behalf of those whom he represents. He has, in my judgment, perfect standing in court. Once a proceeding is instituted, the machinery will not be stopped if there be somebody in interest adequately represented to continue it. If I understand the law correctly, the injunction only goes to certain individuals; certainly, unless I misapprehend the law, it will not go to the parties represented by Mr. Lyons, or to him, as he has no standing whatever except in this forum, and then by special permission of the law. But of course all parties have rights here, and no party is to be forced to a conclusion precipitately. If this matter could be finished today, with justice to all parties, I prefer it should be done. I will take the record as it is presented. There is nothing in this record, as I see it, that vitiates or suggests any want of jurisdiction in this court; on the contrary, the jurisdiction is perfect upon the record. Under the statute this is the forum in which to come to confirm that sale under the power of the will. It is no answer to that to say that there is a contract between the deceased partner and the survivor. We look at the will for the source of the power, and we look at the execution of that power, and then at the prudence of conducting and making this sale. So far as the probate jurisdiction goes, if that power is perfect, that is the end of this court's proceeding; its responsibility is discharged.

I am here to take evidence, unless under your protest—in your objection—you say the court is without jurisdiction, or that the sale is unfair, or in any other way that it is not proper for it to be confirmed.

According to the statement, there is a margin of a hundred and fifteen thousand dollars between the sale suggested in one case and the sale in the other. It is the duty of the court to conserve the interests of minors. It seems now there is a sale reported to the court more advantageous than the one suggested on the other side under an agreement, . . . and the sale was made under a power in the will.

There is no legal excuse for a continuance. I will take the testimony. I will hear Mrs. Fuller.

The executrix was then partially examined, and further hearing was continued until March 12, 1891, at which time the examination of the executrix was concluded, and two of the surviving partners were examined by the attorney for minor heirs and by the court.

Upon the conclusion of the taking of testimony, counsel for the objecting partner again requested that final action on the petition for confirmation be delayed until determination of Mr. Whittier's rights, and thereupon the court ruled as follows:

COFFEY, J. (Orally). You see where that situation would place the court, as a rule of procedure, if you were to establish that. That as to a matter in which this court has acquired jurisdiction, some person with or without cause, or sufficient cause, could go in another department and could then come in here and factiously delay proceedings and impede justice in this department. This court has first acquired jurisdiction. Jurisdiction is perfect already. Then the party desiring to defeat this application here and in good faith—as, of course, I have no question in the present case, but it might be in bad faith in another case, and the precedent would be established—that he could go across the corridor and obtain from the judge, as a matter of course, an order restraining the party until the subject matter of that action was determined in that proceeding. Then the parties are restrained, and this court is arrested in its orderly conduct of work. That would be the result. Of course, I do not desire to have a conflict with another department, and I prefer to delay rather than seek and invite a conflict of jurisdiction or aggravate any existing complications. But

the point simply is, that this court has jurisdiction; and, if the proofs are made in substantiation of the allegations in the complaint or petition, it is the right of the parties to insist upon this going forward. It is the duty of the court to obey that insistence.

I want to see what is established in this proceeding. There is an allegation in the complaint ("Return and Account of Sale") that a certain sale has been made; that it is a good sale. A claim was presented by Mr. Whittier, and rejected and returned to him; a claim, as I understand it, under the partnership articles. Now the court has before it just one bid or one sale, which has, as its earnest of payment, a hundred thousand dollars cash paid, and secured notes. All that is established. Under ordinary circumstances the court would not hesitate a second to confirm the sale. On the other hand, we have, as against the confirmation, a statement that there is an action pending in another department, involving the subject matter of the sale and the claim of a particular surviving partner. It would be a dangerous precedent for a court to establish that, pending that application to confirm the sale by a court with jurisdiction, somebody might institute suit in another department to arrest the proceeding for his own purposes. The minors must be protected by the court, especially because they are under disability. Now, what I say is that the court is bound to exercise its judgment as soon as the particular facts that are brought before it are established. Now, to dismiss this proceeding, or to do anything that would be equivalent to that, is simply to place the estate at a great disadvantage, and to say that it may not be able to obtain as much as it is now in the power of the court to enforce. I see no reason why the judgment of the court should be delayed, and why the order should be refused. I therefore mark the application "granted."

ESTATE OF GERSHOM P. JESSUP, DECEASED.

[No. 5681; decided March 29, 1891.]

New Trial—Law of the Case.—The Rule that the Lower Court on the retrial of a case sent back by the appellate court must follow the law laid down by the superior tribunal can be invoked only when the same facts and questions are presented on the second trial.

Illegitimates—Acknowledgment by Parent.—The Declarations of a Man since deceased are admissible to prove that he was the father of an illegitimate child who claims to have been legitimated by public acknowledgment.

Illegitimates.—In Order to Constitute a Public Acknowledgment of an illegitimate child by his father, the father must treat, receive or acknowledge the child as if he were his own legitimate offspring; and in order that proof thereof may be made by disinterested parties, and fraud and imposition avoided, all of these must be done openly and publicly, not secretly.

Illegitimates—Reception into Family.—The most satisfactory way of establishing the paternity and public acknowledgment of an illegitimate child is by proof that he has been received into the family of the father and given the family name; but this is not necessary where there is sufficient proof of a reason for not having done either.

Illegitimates—Acknowledgment by Parent.—The evidence in this case is held to establish that the petitioner was the illegitimate child of the decedent (an unmarried man), and that the decedent publicly acknowledged his paternity of the petitioner.

Illegitimates—Acknowledgment by Parent.—The institution of heirs is the primary object of section 230 of the Civil Code. The succession of property rights is incidental; it is a status that is involved, the relation of the child to society.

Illegitimates—Construction of Code Sections.—Section 230 of the Civil Code, relates only to minors, who alone are subjects of adoption, and section 1387, provides for giving to illegitimate adults the capacity of inheritance. The latter section is not a limitation on the former one.

Gershom P. Jessup died on November 2, 1886, leaving a will dated August 28, 1867. The will was admitted to probate on November 22, 1886, and letters testamentary issued to S. O. Putnam and Isaac Jessup, the executors therein named.

The testator was never married, and his entire estate was devised to his brother Isaac and his two sisters.

On April 11, 1887, the petitioner, describing himself as Richard P. Jessup, filed his petition, in which, after stating the preliminary facts showing the condition of the estate, etc., he averred that he was the son of the testator and Josie Landis, deceased; that he was born in San Francisco on March 20, 1866; that his parents never intermarried nor lived together as husband and wife, but that the testator publicly acknowledged petitioner as his child, and treated him as if he were a legitimate child, and thereby adopted him as such.

The petitioner was not mentioned in the will, and claimed the estate by virtue of section 1307 of the Civil Code.

The executors, by their answer, put in issue the question of the paternity of the petitioner and the question of his adoption. A trial resulted in favor of petitioner. Upon appeal the judgment of the trial court was reversed. (In re Jessup, 81 Cal. 408, 21 Pac. 76, 22 Pac. 742, 1028, 6 L. R. A. 594.)

The opinion which follows was rendered on a retrial, after the case came back from the appellate tribunal.

Henry I. Kowalsky, for the petitioner (W. H. L. Barnes, of counsel).

John H. Dickinson, for executors (John Garber and D. M. Delmas, of counsel).

COFFEY, J. This matter comes before this court for a second and a new trial, having been remitted hereto by the supreme court, upon the ground that under the evidence in the former trial the decedent herein never did publicly acknowledge the petitioner as his own child, nor receive him into his family, nor otherwise treat him as if he were a legitimate child, and that the evidence was insufficient to justify the decision of this court upon the first hearing of the application, which decision was rendered on the third day of March, 1888: In re Jessup, 81 Cal. 434, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

It is to be expected, as counsel for respondent contends, that something has been settled by the decision of the supreme court, that some rules of law have been established as a guide for the trial court, and that, when the appellate

tribunal has sent back a case, the *nisi prius* court must follow implicitly the law as laid down by its superior; the principles of law which are thus determined must be respected, and when the facts are the same this doctrine must prevail; the judgment of the supreme court, as given in the prevailing opinion, binds this court upon a retrial. A cheerful acquiescence in the views of the superior courts is the duty of the inferior tribunals whose judgments have been reviewed and reversed (*Oakley v. Aspinwall*, 1 Duer, 1); and no matter how repugnant to the reason and judgment of the trial judge the decision of the court of appeal may be, it is his bounden duty to obey without question and conform with respect; but where the facts are not the same, or are essentially stronger, this rule cannot apply; and when the evidence is stronger, or when the facts do not reappear in the same circumstances, the rule has no application.

It is upon the questions of law alone that it applies.

Such a rule can be invoked only when the fact reappears in the same circumstances in which it was originally presented (*Nieto v. Carpenter*, 21 Cal. 488); and the same questions must be presented on the same state of facts: *McKinlay v. Tuttle*, 42 Cal. 576.

So the question before the court upon this second trial may be stated shortly: "Is this the same state of facts dealt with in 81 Cal.?"

I do not understand that the question of paternity of the petitioner was specifically remitted to this court, for after repeated and respectful readings of the prevailing opinion in this case (not only for the purpose of the case at bar, but in other causes on trial in this court in which it has been referred to as authority), I have found nothing to gainsay the statement that "it is conceded—it would have been impossible to deny—that the proof of petitioner's paternity is complete" (81 Cal. 435). It is true, this remark is from the dissenting opinion of the chief justice, but I find nothing in the prevailing opinion at variance with it.

Acting upon the rules of interpretation and construction laid down by the court, "the inquiry is, whether the acts and declarations of the deceased amounted to a public acknowledgment by him of this child as his own, receiving it as such

into his family, and otherwise treating it as if it were a legitimate child" (81 Cal. 424). But in the determination of this controversy upon this trial the court must consider that the fact of paternity is denied even here, and it is the first of the questions of fact which will have to be determined in any proceeding prosecuted by petitioner for the purpose of asserting his claim to inheritance (81 Cal. 416). The counsel for the respondents (Mr. Delmas), in his closing argument, insisted that the concession he made in opening was only for the sake of argument, and not at all as the admission of a fact, and he finally claimed that the fact of paternity had not been established by legal proof, and counsel (Mr. Delmas) asserts that, if we strike out the declarations testified to by the witnesses who were not members of the decedent's family, there is absolutely no evidence to impose the paternity of petitioner upon the decedent, Gershom P. Jessup; and, further, the counsel strenuously urges that the history of the decedent shows that he was not the father of the petitioner, as do the declarations of the decedent to Bogert that he was taking care of a boy child of a friend of his; his statement to Isaac; the will, without mention of the boy. The diary of Gershom, in which he held communion with himself in the secrecy of his own chamber, makes no mention of petitioner as his child, but does describe him in another relation.

Is there a single fact in this case—asks the counsel—is there a single circumstance in this case to distinguish it from the case presented to the supreme court, and upon which that tribunal declared that there was not sufficient evidence upon which there could be founded a claim of public acknowledgment of the petitioner by the decedent, Gershom P. Jessup?

The rulings of the supreme court are imperatively binding upon this subordinate tribunal; and under that, the counsel opposing the petitioner maintains, all the acts of decedent prior to March 31, 1870, must be eliminated; but what was the necessity of counsel discussing the statute of 1850 and its inapplicability to the issue of adoption when the petitioner does not claim that the acts prior to 1870 prove more than paternity?

Those acts show simply the course of conduct and the tenor of treatment by decedent of the petitioner.

The issues, then, to be examined anew by this court are: First, the paternity of the petitioner, and, second, the alleged acknowledgment as son and heir. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court: Code Civ. Proc., sec. 656. We are then to consider the facts as they now appear in this case, and to deduce therefrom the truth or falsity of petitioner's pretensions to the status of son and heir of the decedent.

Is the petitioner the child of decedent? No fact could be clearer in the light of evidence. We have their history most plainly traced from the beginning. The meeting of the bachelor, Gershom P. Jessup, with the girl, Josie Landis, in Marysville; the ripening of their early acquaintance into intimacy; frequent intercourse in that town; her coming to San Francisco; her being placed in the care of the nurse; the birth of the child, without a suggestion anywhere in the record of any other procreant cause. There is nowhere the shadow of an intervener in their intimacy between the begetting and the birth of the boy born at 3 Varennes place, San Francisco, on March 20, 1866.

It is established here that in 1865, when the decedent was a resident of Marysville, he met and made the acquaintance of Josie Landis, a young lady of intelligence, education and refinement, well reared, not long returned from school in a religious institution in Santa Clara county, to which she had been taken by leave of her parents, under the chaperonage of the wife of the pastor of the Methodist church in the town or village in which she had lived—Nicolaus, Sutter county. The testimony of her schoolmates is to the effect that she was amiable and accomplished. One schoolmate remembers her because she was quite musical (see testimony of Mrs. Georgianna Elizabeth Russell, page 71, Judge's MS. notes, second trial); another schoolmate witness was the daughter of the minister's wife who accompanied the young lady to school in Santa Clara (see testimony of Mrs. Mattie Deal, page 74, Judge's MS. notes), and who knew her very well in Marysville.

It was this young lady who, having contracted the acquaintanceship of the decedent, became his victim, and their intimacy having become a topic of comment in the community, the result of their intercourse being no longer doubtful, she came to San Francisco, and was here placed by her seducer, on or about the 1st of March, 1866, in the care of Mrs. Abigail Nugent, a colored woman of undoubted character and peculiar fitness for her delicate trust. In her home, on the 20th of March, 1866, the petitioner was born. The story of her daughter, the witness Mrs. Margaret E. Hatton, as given on this trial, though necessarily largely repetitive of her testimony given on the first trial, may be summarized here for comparison with the evidence intended to overcome its effect. Mrs. Hatton testifies in substance, that Gershom P. Jessup brought Miss Josie Landis, in the year 1866, to the house of her mother, who is now dead; Miss Landis remained in that house for about nine weeks, until after the birth of Richard; witness heard a conversation between her mother and Gershom Jessup about the young lady; he called to see her after the birth of the baby and inquired of mother of witness how Miss Landis felt, how she was getting along; mother replied that she was feeling bad, despondent over her situation; mother said that she thought he ought to marry her, as he was the cause of her downfall; he replied that he would do what was right by her; the child was born March 20, 1866; Miss Landis was there a week or ten days before the baby was born, and he was seven weeks old when she left. Mrs. Rachel Quinn assisted mother of witness; she was employed by her mother; after the birth of the child the father came; two gentlemen came with him; one was his brother, Isaac Jessup, and the other a Mr. McClellan; Isaac Jessup did not visit there more than once at that time; Gershom and Isaac both called together after that, once while Miss Landis was there, twice afterward; witness was at home when they called; they talked about the baby and took him and played with him; first one and then the other would take up the baby and talk to him and talk about him; Gershom would ask Isaac if he did not think the baby was a fine boy, and asked if he did

not look like him. Gershom introduced Isaac to witness as his brother; saw Miss Landis write; would know her handwriting; saw her write several times when she was at mother's house (papers produced and shown to witness); witness first saw those letters at her mother's house; her mother opened and witness read them; they were from Miss Landis, from Nicolaus, Sutter county; the envelopes were postmarked "Nicolaus," and some, witness thinks, "Stanislaus," but am not sure about that (letters introduced); those letters are in the handwriting of Miss Landis, mother of Richard; witness saw Miss Landis afterward, between 1870 and 1872; she came to house of witness in Petaluma and remained all night; she conversed about Richard; she asked witness to allow Richard to sleep with her that night; she wanted to know how Richard fared, how he was treated, clothed, and how his father acted toward him; she spoke of Gershom P. Jessup as the father; she called him "Gus"; she remained from early in the evening until next morning; the boy Richard remained with witness in Petaluma for seven or eight years; then witness brought him to San Francisco, and he resided with her mother until she died in August; then he went to Washington College, at Washington Corners, Alameda county, where witness took him at request of his father. Gershom Jessup paid for board and care of Miss Landis while she was at witness' mother's house, and he paid for Richard; he paid mother of witness \$40 per month, exclusive of clothing, for Richard from the time he was born; his father always provided the best clothing, and directed that he should have the best; he didn't want the child to wear calicoes, he wanted him in white always; he once called and saw the child in a "print," a calico dress, and he wanted mother of witness to never mind the expense, but have the child clothed in white, as he was able to pay for it; he used to caress the child and call him pet names, "daddy's child," and witness could not remember how many foolish things; Richard went with his father to Woodward's Gardens, North Beach and the Cliff House; Richard called him "papa" in the beginning, and later "father"; they went in the street-car; witness went with them; they went quite often; there was a menagerie, monkeys and parrots, at North Beach;

"Dick" was very fond of them; his father would give him money to buy nuts and candies to feed the animals; his father used to carry the child; Richard was sick sometimes; his father always told witness to take the best care of him and to send for the doctor without delay; Dr. H. H. Toland used to attend him when the boy was sick; the child had a wet-nurse, a Mrs. Renfrew, of Petaluma, recommended by Dr. Wells of that place. Mr. Gershom P. Jessup paid her \$50 per month; witness had correspondence with his father about the child; received letters from the father, but have none now—they were destroyed by witness with other papers and letters before she went east; witness made a search for letters among her effects in Napa; but only found the letters produced here written by Miss Landis; witness destroyed the letters in October, 1866, when she destroyed a number of letters and notes and papers she thought of no value; the letters produced here were among the witness' mother's papers which witness got after her death; witness took the child to Mrs. Renfrew's, and Mr. Jessup gave witness \$40 extra for her trouble in carrying the child for three months; Richard was very delicate, and his father gave instructions to always call the doctor without consulting him; witness knew the artist, S. M. Brookes, and took Richard to him at the request of the father to have the boy's picture painted; took Richard to the artist Brookes; had also the picture, ambrotype in velvet case, with lock of hair inclosed, made at the request of the father; there was only one ambrotype, the one produced in evidence; after he had the oil painting he gave it to witness back; Gershom Jessup said he named the child Richard after his brother, who died and left him what he had; and he wanted Richard to have the name of his uncle and the property, as it all started from him; Richard was christened "Richard Page Jessup" at the direction of his father, and by Rev. T. M. D. Ward, presiding elder at Petaluma; witness was present; mother of witness told Mr. Jessup about it and he gave her \$5 to give to the minister, who is now a bishop, and may have been such then; witness had a son christened at the same time, Richard Henry Miller; Mr. Jessup did not want Miss Landis to see the child; he was afraid she might make him dissatisfied and want to take

him away; once Mr. Gershom Jessup called at mother's; he was very much excited, and said that Miss Josie's folks had heard about that little affair, and he was afraid one of her brothers was coming down to shoot him; when witness took the boy to Washington College, met Mr. Harmon, the principal, and he said that Mr. Jessup had made arrangements for "little Dick"; had conversations with Professor Harmon about the boy and concerning provisions for the boy's welfare, talked about his clothes, his studies, and how he was getting on; Mr. Harmon told witness not to send the boy any more money, as witness had been in the habit of sending some change, and Mr. Harmon thought it might have a tendency to make him extravagant, and his father furnished all that he needed; the boy was entered as "Richard Miller" at the direction of his father, who said he did not want his mother to know his whereabouts; Mr. and Mrs. Harmon always spoke to witness of him as "Richard"; Mr. Harmon always alluded to Mr. Gershom Jessup as Richard's father; when Richard was quite a baby his father wanted to take him east to some of his relatives, he didn't say what part of the east; when Richard had grown up his father told witness he wanted Richard to learn to work, to grow up so he would know the value of money, as he would have all that he left and he wanted him to know how to take care of it; once Mr. Jessup, about two years before he died, told witness he thought of keeping house, and he was thinking of having witness to keep house for him as she had raised Richard, and he wanted to have him with him, so that when he had his rheumatic spells he might have some one with him to look after him; witness told him she could not, as she was about to get married again; he spoke of this again not many months before he died, in March, witness thinks; he said he was tired of moving around from place to place, and he wanted to have Richard with him; Mr. Jessup told her she should address the boy as "Richard Jessup"; while she was at Petaluma letters came in her care, she gave them to Richard; she saw Richard write letters addressed to Mr. Jessup; he wrote without her assistance; he showed her the letters to see if they were correct, as he wanted the letters written to his father to be correct, to be perfect. After

Richard was fifteen or sixteen years old his father purchased most of his clothes—sometimes made to order—some she purchased while he was at Petaluma; when Richard went to San Diego he wrote to her; she has none of those letters now, destroyed; he signed sometimes "Richard," sometimes "R. P. J."; when he came from San Diego he came right up to Napa; witness wrote to Mr. Jessup, and received a reply, but has not retained or preserved that letter; she received two letters, perhaps three; in one of them he wanted her to keep Richard in Napa; he wanted her to see after him; he wanted him to work, but not too hard; she saw his father after in San Francisco; she told him Richard had been working in a tannery; that he had got tired and wanted a rest; his father said he had seen him; Richard came back to Napa, and she told his father that he wanted a watch and he sent one to him; she sometimes supplied Richard with money and his father would refund it; Richard was restless and inclined to rove; Mr. Harmon said that Richard was a bright scholar—thought he would make a good business man; once an accident happened to Richard—he fell off a horse, and he had concussion of the brain, and he had to have a doctor. Mr. Jessup was angry when he heard of it; witness called to see Mr. Jessup often in San Francisco at various places where he had his rooms; she met a colored man who used to wait upon him, and once she saw Isaac Jessup there; she had Richard with her at those times; she remembers now an incident that occurred then about a pair of pants purchased by his father for the boy; Richard remained with his father one night on Market street, when she brought him from the college, and she went to San Rafael, and he remained over night with his father; the same day, when she came back, had lunch with his father and Richard at Swain's, on Market street; when she told Mr. Jessup she could not keep house for him he said he was sorry, and he made her a present of \$40; the mother of witness was a Methodist, and attended church on Powell street, between Pacific and Jackson streets; witness thinks that her mother came to California between 1856 and 1858; she was a ladies' nurse; she worked for Colonel Smedberg, Hall McAllister, Colonel Sumner, U. S. A., Colonel Charles L. Weller, Post-

master, I. W. Raymond, S. F. Butterworth, Major P. B. Reading, George and John McMullin, and other families; when the mother of the boy came to see witness at Petaluma she told her she had been married to a Dr. Weston.

In connection and in comparison with this testimony may be considered the evidence of Isaac Jessup, surviving brother of the decedent. He says that he is now fifty-eight years old; from infancy to 1850 he was intimate with Gershom; come to California in 1850 and remained until 1854; and continued on intimate and friendly terms with him until the witness returned east; was away ten years; came back in 1864; Gershom was not married; so far as witness knew he had no child; witness knew Mrs. Abigail Nugent; she came to his rooms in 1865; witness again saw her on Union street when he was on his way to the baths at North Beach; he met her near a little street—Varennestreet—and she asked him to go into her house to see a baby; the witness went in and saw a little white baby on the bed; he asked her whose child it was, and she said "you know"; witness did not know and had not the remotest idea whose it was; subsequently, however, he spoke to his brother Gershom and told him of the incident of meeting Mrs. Nugent and seeing the child, and asked him about it; he said it was not his; but a few months prior to his death Gershom was over at Isaac's house in San Rafael, and when he was leaving, on his way to the train, Isaac said to him: "Gus, whatever became of that boy you were putting up for?" To which Gershom replied that he had tried to make something out of him, but the boy was of no account and he had to let him go; the witness says he asked him this because he had been informed that Gershom was "putting up" for a boy; the witness never saw the boy except when he was a baby in Mrs. Nugent's house, and does not know that it was the same; he knew Josie Landis; first saw her in 1865, on Pine street, in the studio of a Mr. McClellan, by whom he was introduced to her; between that time and 1874 witness had not seen her until he met her in the cars at Sacramento on his trip to San Francisco; witness denied that he had ever laid eyes on the petitioner before this proceeding was begun except as he had already testified; never was with him in the cloth-

ing store of Joseph Brothers, as Harris Joseph states (Harris Joseph testified [see pages 21 and 22 of Judge's manuscript notes on this trial] that he was a merchant tailor on Montgomery street, and knew Gershom Jessup, and used to make clothes for the boy Richard; made his clothes of the best material on the order of his father Gershom; witness saw the boy at his store in company with Gershom and Isaac Jessup; Gershom Jessup and the boy generally came on Saturdays when witness was very busy; Gershom would speak of the boy as his "son" of his "boy"; the boy was fourteen or fifteen years old at the time when Isaac Jessup came; Mr. Harmon came with the boy the first time; the reason why witness did not mention on the former trial that Mr. Harmon came with the boy was that he had not been asked the question, and the same with regard to the visit of Mr. Isaac Jessup).

The witness Isaac Jessup further testified that he was certain it was in 1865, and not in 1866, that Mrs. Nugent called to see his brother; witness saw the lady in the summer of 1866; approximately it was about seven or eight months before that time that Mrs. Nugent called at his brother's room; witness thought it was before the final distribution of his brother Richard Manet Jessup's estate that he saw the baby; he judged the boy was about four months old at that time; the first time the colored nurse called at his brother's room the witness did not ask her name; the second time she called, he inquired, and she told him "Mrs. Nugent," but witness was positive that this was not in 1866, as in the fore part of that year he was not occupying his brother's rooms; a friend of his was, and witness occupied rooms elsewhere for most of that year; when Gershom returned to town Isaac told him of her visit, that a colored lady named Mrs. Nugent called, but he said nothing; that was at 240 Montgomery street, southwest corner of Pine street; when witness met Mrs. Nugent on the street she asked him if he did not want to see a fine baby boy; he said "yes"; she requested him to go along with her, and he went into her house, and after inspecting the child he asked whose it was; she said "you know"; witness avers that he did not know, but after he had seen the baby he saw his brother at his room at the

southwest corner of Pine and Montgomery streets, the same place where the woman had previously called, according to his testimony, and told him about the colored woman and the child and the incident of meeting her and seeing the baby, and Isaac asked Gershom, "Gus, who does this baby belong to?" and he replied, "It don't belong to me." Those were the words he said, and the witness said to him, "The child looks something like you," or words to that effect, to which he made no answer but laughed it off; when witness saw Miss Landis he did not notice that she was in the family way; when he spoke to his brother Gershom in San Rafael and asked him where was the boy he was putting up for, Gershom responded that "the boy was of no account; he got tired of him and let him go"; those were the only two conversations Isaac ever had with Gershom about the boy. Gershom told him he had been taking care of him and trying to make something of him, but he was of no account and he threw him off; witness thought that Gershom said he had been educating the boy; witness was sure that he never saw that boy except as he stated in his testimony; after the decision of the case upon the first trial he had a conversation with the boy in which there was a suggestion of compromise, but witness thought the terms offered by the petitioner too small, still he thought the petitioner ought to settle and have something left, as if the litigation went on the lawyers would have all of it—a most prudent proposition, if no principle were at stake.

This testimony of Isaac Jessup is of pregnant import when compared with his testimony upon the former trial concerning his knowledge of Josie Landis and the boy, and considered in conjunction with the language of the prevailing opinion in 81 Cal. 426, 427, which it is appropriate here to quote:

"It is sufficiently shown that the mother of the child remained at the house of the nurse about seven weeks, during which the deceased called there frequently, the witness says, and Jessup paid all the expenses. After the mother left, the child was kept and cared for by the nurse, at the expense of Jessup, who called frequently to see it, and, as it got old enough to observe things, would play with it, calling it his

boy and calling himself daddy, and at a still later period would take the child and the witness—who appears at that time to have acted the part of nurse girl to the child—to North Beach and let him see the animals there, and buy nuts and cakes for it to feed to them. The girl says that he was very fond of the child, and that it was called Richard at his request. Her testimony is very full as tending to show his interest in and apparent affection for the child while it remained at the house of the original nurse and in the city of San Francisco, she saying, among other things, that he said 'he wanted to make a man of him'; and 'if Richard behaves himself and does what I want him, he will not be sorry for it,' and many other expressions of this kind. All this might have gone far toward proof of acknowledgment and adoption if it had been public and at a time when the law authorized adoption by such kind of acknowledgment. But it was never public. It was made and done only to and in the presence and hearing of the negro family, in whose care he placed and continued to keep it. When he took it out it was with the negro girl, and then not to a place where he would be likely to meet members of his own family and friends. And it all occurred during the period of the child's residence in San Francisco."

It is here shown by the testimony on this trial of Isaac Jessup that he visited the very place for the purpose of seeing this child where the learned justice said the father, Gershom, would not have been likely to meet any member of his family.

It is plain, from his own evidence, that Isaac Jessup knew all the time that Gershom was the father of Richard and was discharging the obligations of a parent toward him; he himself has said, in so many words, that Gershom told him he had been taking care of the boy and had been educating him and been trying to make something out of him, but that he had thrown him off because he had been unable to accomplish his purpose; and this conversation occurred only a few months before the death of Gershom (see page 66, Judge's MS. notes of this trial). It seems to me that, taking the evidence of Isaac Jessup throughout on this trial, in connection with his conduct as disclosed by the record here made,

there can be no doubt that he at least believed that his brother Gershom was the father of this boy, and that this belief was fostered and fortified by the action and avowal of the decedent; even when he tried to evade the questionings of Isaac and endeavored to dismiss the subject by "laughing it off"; but it was no laughing matter, and the truth did finally come out when, with apparent chagrin, Gershom confessed candidly to Isaac, in their last interview at San Rafael, that he had discarded the boy because he was disappointed in his hopes of making a man of him; it was the expression of one brother to another, who had been persistently pursuing the subject for the purpose of eliciting a direct and unequivocal answer—a full and final answer, closing all doubt, from the father of the boy to a member of his own family, "such family as he had" (81 Cal. 434), the only surviving brother and the only member of the family resident in this section of the country.

When we place in parallel the testimony of Mrs. Hatton, the daughter of the nurse Mrs. Nugent, and that of Isaac Jessup, in this second trial, there seems to be an unconscious confirmation by the latter of the story of the former, which in itself is clear, coherent and consistent throughout; for, with all his studied evasions, Isaac Jessup has confessed to a knowledge of the boy almost from birth, and his whole course of conduct from the beginning shows his abiding conviction that the decedent was the author of the "fine white baby" whom he was induced by the colored woman to visit and examine at 3 Varennes street, when on his way to the North Beach baths; his question as to its paternity; the significant interrogative answer of the nurse, Mrs. Nugent, "*you know*"; his assumption of innocent ignorance at the time; his rumination after retiring from the abode of the nurse; his guessing and suspicion as to the paternity of the child; his pointed remark to Gershom when he said, about a month afterward when he told him of the incident, "The child looks something like you," and the latter made no reply, but laughed it off—there was no denial in that; his behavior after the death of Gershom and his destruction of papers belonging to the deceased immediately after he obtained possession of his effects (see pages 71 and 72 of

Judge's MS. notes); his interview with Richard after the first decision of the supreme court and before the rehearing; all these circumstances, and more that may be gathered from the record, point with unerring finger to the recognition of petitioner by this sole member of such family as Gershom had upon this coast.

The letters of Miss Landis to the colored nurse, Mrs. Nugent, alluded to in the abridgment above of Mrs. Hatton's testimony, having no element of novelty in this second trial, need no further reference, except in so far as it is necessary to the connection of the circumstances constituting the chain of this new case.

In regard to the declarations of decedent with respect to his relation to the petitioner, it seems that under the code evidence was admissible to show that he was the father of the boy (subdivision 4 of section 1870 of the Code of Civil Procedure), and these declarations are abundant to establish that fact.

It seems to me that the issue of paternity is strictly and plenarily established as alleged by petitioner, and that every requirement of the rules of evidence in that behalf has been fully complied with.

Having disposed of the issue of paternity in favor of the petitioner, we have to consider the remaining question of recognition and acknowledgment. Petitioner claims under section 230, Civil Code, which requires the institution of heir or adoption to be made by the father. It must be the father. The institution of heir is the primary object of the statute. The succession of property rights is incidental; it is a status that is involved; it is the relation of the child to society.

In the opinion of this court three of the elements of the statute, section 230, Civil Code, have been established: 1. There was an illegitimate child; 2. The petitioner was that child; 3. Gershom P. Jessup, the decedent, was the father of that child. We are now to consider the question, Was the petitioner publicly acknowledged by Gershom P. Jessup?

What satisfies the statute upon this issue? This is answered in *In re Jessup*, 81 Cal. 457, in the opinion of Mr. Justice Works, in stating the doctrine applicable to such

a case; and I do not interpret the later decision in the same estate as announcing a discordant principle (81 Cal. 413).

Is the evidence produced on the part of petitioner sufficient to show that the decedent, Gershom P. Jessup, "publicly acknowledged" him?

To establish his right a claimant must prove two things:

1. That he is the illegitimate child of the alleged father;
2. That he has been openly and publicly acknowledged, and received and treated as such. But in order to avoid imposition and fraud, the statute requires that these things shall be established by certain proof. Under the statute of 1870, it must be proof of his "treating, receiving or (and) acknowledging him publicly as his own legitimate child." That is to say, he must treat, receive or (and) acknowledge him as if he were his own legitimate child; and in order that the proof may be made by disinterested parties, and fraud and imposition avoided, all of these must be done openly and publicly, and not secretly.

Section 230 of the Civil Code, although differently worded, is in effect the same. The language is, "by publicly acknowledging it as his own, receiving it as such into his family, and otherwise treating it as if it were a legitimate child."

Undoubtedly the most satisfactory way of establishing the necessary facts is by proof that the claimant has been received into the family, and given the family name.

But this is not necessary where there is sufficient proof of a reason for not having done either: In re Jessup, 81 Cal. 434.

Mr. Justice Fox said, in the finally prevailing opinion in the case cited: "It is said that as Jessup was never married, he was not bound to receive this child into his family, for he had none in which to receive it. But we do not so read the law. The language is, 'publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child.' If he has a wife, he can only receive it into the family with her consent; but if he has no wife, he must still receive it into his family; that is to say, in such family as he has, the child must be acknowledged

and treated as his—at least, he must not deny to the members of such family that it is his”: *In re Jessup*, 81 Cal. 434.

The oral declarations made by decedent to various witnesses are numerous and continuous through a course of years down to a very short time before his death.

I have considered the declarations as to paternity by themselves alone, as near as might be, and separate and segregated from the declarations of acknowledgment when treating of the first issue tendered by petitioner, but necessarily much of the evidence in favor of public acknowledgment is inseparable from that of paternity.

As to acts of public acknowledgment, it is important to keep in mind certain dates, as the rule of construction is, according to the decision of the supreme court, different under the code, section 230, which went into effect January 1, 1873, from what it was under the statute of 1870, and here it seems, in order that there may be no misprision in interpreting the opinion of the supreme court as rendered by Mr. Justice Fox, that its terms should be quoted, (81 Cal. 419-425):

“All the rights which are given to the petitioner in the premises are given by statute, passed in derogation of the common law. It is claimed by the respondent that in determining those rights the rule established in section 4 of the Code of Civil Procedure is to be applied, and the statutes are to be liberally construed with a view to effect the object and to promote justice. That is true, so far as it applies to the provisions of the code, when applied to the acts of the deceased done since the passage of the codes. But the converse of the proposition is the rule, so far as reliance is placed upon the statutes passed prior to the codes and acts done under them: *Pina v. Peck*, 31 Cal. 359. And even as to the code, ‘liberal construction’ does not mean enlargement or restriction of a plain provision of a written law. If a provision of the code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its apparent object and promote justice.

"The law in force at the time of the birth of the respondent reads as follows: 'Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child': Stats. 1850, p. 220, sec. 2. This statute must be strictly construed: *Pina v. Peck*, 31 Cal. 359. There is no pretense that any such written acknowledgment was ever made. It follows that under the statute neither oral admission nor proof (otherwise than by such written acknowledgment) of the fact of paternity will constitute the illegitimate child an heir.

"This statute continued in force until March 31, 1870, when it was repealed, and the legislature passed 'An act providing for the adoption of minors and the legitimizing of children born out of wedlock': Stats. 1869-70, p. 530. The third section of this act provides, among other things, that an illegitimate child cannot be adopted without the consent of the mother, and that the consent of the minor, if over twelve years of age, shall always be necessary. If this section is construed to apply to the adoption provided for in section 9 of the same act, it requires things which there has been no attempt to prove in this case, but we think that it cannot be fairly construed to have any application to adoptions under said section 9. The first seven sections of the act provide for the adoption of children by strangers, and, while the language of section 3 referred to seems to be general, we think it was intended to be limited to the cases provided for in that part of the act embraced in the first seven sections. Sections 8 and 9 read as follows:

" 'Section 8. A child born before wedlock shall, to all intents and purposes, become legitimate by the subsequent marriage of its parents.

" 'Section 9. Either or both parents of an illegitimate child, or the father with the consent of his wife, or the mother with the consent of her husband, may acknowledge such child as his or their own by a document in writing, executed by either if single, or both if married, or by treating, receiving, or by acknowledging him publicly as his or their own legitimate child; and such child, and the one mentioned in the foregoing section, shall, to all intents and

purposes, be deemed legitimate from the time of its birth, and entitled to all the rights and privileges of legitimate offsprings.'

"This statute must also be strictly construed, for it was not until the adoption of the codes, and is only as to the codes, that the rule that statutes in derogation of the common law must be strictly construed, was changed. This was the first statute which authorized legitimizing of an illegitimate child by any mode other than the written acknowledgment provided for in the statute of 1850, and at the time of the adoption of this statute the respondent in this case was a little over four years of age.

"This statute remained in force until January 1, 1873, when section 230 of the Civil Code took its place. That section, so far as it relates to the legitimizing of an illegitimate child, provides: 'The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth.'

"This provision, being a part of the code, is to be liberally construed, but it is not retroactive, and relates only to minor children (*Estate of Pico*, 52 Cal. 84, 56 Cal. 413). Section 1387 of the same code is a part of the chapter on succession, and provides: 'Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir of his mother, and inherits his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock.' It is contended that this provision of section 1387 is a limitation upon section 230, but we do not think that the code should be so construed. The whole chapter on adoptions relates to the adoption of minors; and by the express provision of this section 230 an illegitimate minor, acknowledged and adopted as therein provided, 'is deemed to be legitimate for all purposes.' One of the objects of adoption, and of legitimizing by adoption, is to give the capacity

of inheritance. It has been already determined in the *Estate of Pico*, 52 Cal. 84, 56 Cal. 413, that this section relates only to minors, who alone are subjects of adoption, and that section 1387 provides for giving to illegitimate adults the capacity of inheritance.

"It follows from these statutes, and the rules of law applicable to the construction thereof, that prior to 1870, when this respondent was four years of age, he (the respondent) could not have been adopted by the deceased, or given the capacity of inheritance from him, except by acknowledgment in writing in the presence of a competent witness; that from March 31, 1870, to January 1, 1873, he could have been so adopted and given such capacity either by acknowledgment in writing as before, or by the deceased having 'treated, received or acknowledged him publicly as his own legitimate child.' Both these statutes must be strictly construed: *Pina v. Peck*, 31 Cal. 359. It is conceded there was no written acknowledgment, such as prescribed by either statute. The act of 1870 cannot be construed as retroactive, so as to give force or effect to acts done or performed before its passage, which they would not have had at the time they were so done or performed. Since the 1st of January, 1873, he could have been so adopted and given such capacity of inheritance by the deceased having 'publicly acknowledged him as his own, receiving him as such . . . into his family, and otherwise treating him as if he were a legitimate child'; and this provision is to be liberally construed. But liberal construction does not mean that even this provision is to be construed to be retroactive. Nothing that was said or done by the deceased prior to January 1, 1873, can be construed as proving, or tending to prove, such adoption, unless it had that effect at the time it was said or done, and under the law then in force.

"Liberal construction does not require or authorize the frittering away of the written law. Nor are we authorized to consider the apparent justice or hardship of particular cases, for we are not appointed to decide cases alone, but to settle principles first; and, second, to decide cases according to those settled principles as applied to the facts presented in the cases. The decision of a single case according to its apparent justice or hardship might establish a principle that

would cause greater injustice or greater hardship in numerous other cases. While it is true that illegitimate children are themselves innocent of wrong, and for that reason are entitled to the sympathies of mankind and to such reparation as the laws can give, it is equally true that courts ought not, by any extraordinary liberality in the construction of those laws, to enable wantons in silk, having children without names to prey upon the estates of dead men, however much they may have thrived through the fears of living ones. While in this particular case no adventuress is seeking to recoup for her own wrong, it is important to see that a rule of law is not established by construction, which would place a premium upon perjury in other cases, though none may be manifest here. Of the women who are mothers of nameless children, there are few indeed who would hesitate at any fraud, or to whom perjury would seem a crime, if by means of it a dead father who had left a goodly estate could be secured for the nameless one, and this even while continuing in illicit intercourse with the actual father still living. And human nature is so weak that even men are not wanting who would aid their mistresses in palming off their own children upon the estates of dead men, if thereby a competence could be secured upon which both, with their illegitimate offspring, could continue to live in luxury and in crime. On the other hand, the court ought never, by a strained construction in the other direction, to relieve a licentious man or his estate of any of the obligations or burdens which the legislature has imposed as a restraint upon vice, as a reparation to those who actually suffer from his vices, or as a protection to the commonwealth from the burden of supporting the nameless offspring of his crimes. Between these two dangers, the duty of the court is fairly to interpret the laws as the legislature has framed them, without regard to how its action may affect individual cases. If thus interpreted they are found to be too stringent or too liberal, the remedy is through the legislature, and not the courts.

“Acting upon these rules of interpretation and construction, the inquiry is, whether the acts and declarations of the deceased amounted to a public acknowledgment by him of

this child as his own, receiving it as such into his family and otherwise treating it as if it were a legitimate child.

"As he had no home and no family, in the strict sense of 'a collective body of persons who live in one house and under one head or manager—a household including parents, children and servants,' it would not be a fair or liberal construction to say that the child had not been adopted or acknowledged because he had not been received in such a home or made a member of such a family. On the other hand, since it is a fact that the deceased did have a family in the sense of having 'brothers and sisters, kindred, descendants of one common progenitor,' with some of whom he was brought into frequent contact, and also business associates and friends with whom he was in daily intercourse, from all of whom he not only studiously concealed, and to his brother in express terms denied, the relationship, it would require a liberality of construction destructive of the language of the statute itself to hold that there had been an adoption within the meaning of the code, or of the statute of 1870. And it is conceded that there was none under the statute of 1850.

"An analogous question was recently considered by this court at great length in the case of Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131, and the sum of conclusion there reached was that the parties must have held themselves out to their relatives, friends, acquaintances and the world as occupying toward each other the relations claimed for them in the action. Speaking generally, the laws applicable to this case seem to require something like the same kind of public acknowledgment and recognition as was required in that case. Was there such acknowledgment and recognition?"

Some of the remarks on page 423 of the above-quoted report are admittedly irrelevant and obviously inapplicable to the record of this cause, for the unfortunate mother of petitioner, as her letters and her life attest, was neither wanton nor wicked, apart from the connection with Gershom P. Jessup, which resulted in the birth of this boy. Otherwise, the character of Josie Landis is clean and clear, and her contrition for this single lapse is manifest in all her correspondence, conversation and conduct. Her letters prove that she was the victim of a broken and contrite heart, and that her

life was saddened and shortened by remorse for her solitary error. And only in relation to this particular portion of the opinion quoted from does it seem essential to recur to the subject of her correspondence, for that part of the opinion suggests the question: What was the solution of the issue tendered by these letters—the object of maternal solicitude, the poor little child begotten of her sin and shame by the decedent? The father, Gershom P. Jessup, solved the problem by assuming the obligations of a parent toward the child; but all this conduct, says Mr. Justice Fox, did not amount to anything; it would have gone far if at the time there had been any such statute as that of 1870, or the Civil Code, section 230 (81 Cal. 427).

It is fair to assume that if the record, as now made in this second trial, were before the learned justice, the terms of his opinion would be materially modified. If the facts, as now disclosed, of Isaac Jessup's knowledge and recognition of the petitioner were before him, it is not improper to presume that the learned justice would have found that the decedent had in a sense (and in the sense indicated by the prevailing opinion of the supreme court) publicly acknowledged his paternity of the petitioner.

In this opinion I do not choose to review the evidence reproduced from the former trial; it is enough simply to allude to it as a part of the entire case, concerning which there is no need to reiterate views already expressed. I have been endeavoring to keep within the lines of the last opinion of the supreme court, and to deal with the additional elements of evidence which, it is claimed, make a new and sufficient case conforming to the principles settled by the appellate tribunal, which principles must be applied to the facts presented (81 Cal. 423).

The new and pregnant matter in Isaac Jessup's evidence has been already treated as establishing knowledge and recognition by a member of the family and acknowledgment by the decedent; it shows that Gershom had done, up to the time he "threw the boy off," at least, "what every honest and humane man should be not only willing but eager to do." Isaac says plainly that only a short time before his brother's death Gershom said that he had been taking care of the boy

and had been trying to make something out of him and had been educating him. What stronger acknowledgment could possibly be made, in view of the fact of paternity, which it was impossible then to deny? In view of their mutual understanding and knowledge that Gershom was the father, what more could be asked as a recognition of obligation discharged to a certain extent? "Gus, whatever became of that boy that you were putting up for?" What boy was here in question except the boy begotten of the body of Josie Landis by Gershom Jessup? The very boy that Isaac told Gershom, in their rooms, after the incident of the visit to Mrs. Nugent's house, looked like him, when the father made no answer, but "laughed it off." Was that a denial? Did not his silence then and his manner and conduct subsequently signify assent? It certainly did to Isaac, as his continual recurrence to the subject matter and his continuous course of conduct establish. How could Gershom have "thrown off" the boy if he had assumed no relation or contracted no obligation toward him? And, if he had done so, his throwing the boy off, because of his waywardness or worthlessness, neither altered the relation nor diminished the obligation.

According to Isaac's testimony alone, in this trial, the petitioner has a sure footing as the son and heir of his deceased brother Gershom, for it appears therefrom that he had not only acknowledged the child, but he had given him support and education until he proved intractable, thus partially, at least, discharging the duties of a parent: Civ. Code, sec. 196.

The testimony of Mrs. Marietta Ransome, a new witness, for petitioner, is important to consider.

Counsel for respondent claims that there are only three new points in her evidence: First—that Isaac knew all about the matter; second—that Isaac met Miss Josie Landis at the train and accompanied her to San Francisco; third—that Gershom admitted that he had always publicly acknowledged Richard and treated and maintained him as his own son; and counsel (Mr. Delmas) asks: "Can the acts which the code requires to be performed be all established by a simple statement of the father that he has performed them? Can you supply a proof of the fact by a mere acknowledgment or a declaration

by a party that he has done those acts which the statute has prescribed as necessary to create the status?"

These questions find their answer in the language of the statutes of the state, which are the criterion for this court, rather than cases decided when and where no such statute existed; and such declarations have been heretofore, in this and other important cases, received without objection. The provision of the Code of Civil Procedure, section 1870, subdivision 4, does not strike me as a re-enactment of the common law as it was existent at the time of the cases cited by counsel; at all events, it has not been so construed in this state, if I apprehend correctly the authorities.

Mrs. Marietta Ransome is an entirely disinterested and manifestly truthful witness. She testifies to the statements made by Mrs. Weston (formerly Miss Josie Landis) to her in Sacramento City while she was boarding in the house of witness during the years 1878 and 1879, and to the visits there of the decedent Gershom, and his declarations as to the paternity of the petitioner, and his having always cared for and acknowledged and never denied him as his child; but the counsel (Mr. Delmas) for respondent says that, conceding that this witness appears before the court in the most favorable attitude, her testimony is of the very weakest kind, and only cumulative in its character; the danger of this kind of testimony, says the counsel (Mr. Delmas), is that by lapse of memory, interest in the case, or by sympathy that warps the memory, the witness may misinterpret the words she attempts to reproduce; thus it is that this aged witness, after so many years have elapsed, undertakes to give the very language of the statute, the declaration made by the decedent, Gershom P. Jessup; and counsel (Mr. Delmas) asks the court to mark the time when this evidence comes forward, at the eleventh hour, after the last decision of the supreme court, in the urgency of the case, to supply the connecting link in the chain of evidence; and the counsel (Mr. Delmas) requests the court to consider that this important item of evidence was not given on the first day of her testimony (September 29, 1890), but only after nearly twenty-four hours subsequent to the adjournment on that day. Mrs. Ransome was on the witness-stand three days, and, considering the strictures of

counsel upon her testimony, it may be well in this place to insert an abstract thereof:

"Three years resident of Los Angeles; married since three years to Mr. Ransome; formerly the wife of J. T. Landrum, once a judge of Shasta county; lived in Sacramento county for twenty years till I moved to Los Angeles; knew a lady named Mrs. Dr. Weston in Sacramento; she boarded with me for about two years there; knew she was Josie Landis; had conversation with her concerning her family; she told me she had a boy, whose name was Richard; she said the father was Mr. Jessup; my husband died the same year that Mrs. Weston came to live with me, about thirteen years ago, between 1878 and 1879; I used to find her weeping; she was a very sad lady; one evening I found her weeping and walking the floor in her room, and I asked her what was the matter, and she walked to the bureau and showed me a picture and said, 'That is the cause of my trouble—that is my child by a Mr. Jessup'; she said they would have been married except for the interference of her father and mother; she said the child was being cared for by the father; had other conversations with her once about Mr. Jessup calling to see her; she told me that he would be there that morning and that he was the father of her child; he called; she introduced me to him as 'Mr. Jessup'; they went to her room and were there about an hour; she called me and said she wanted me to come in, and Mr. Jessup said, 'This is the mother of the boy that I have'; he said that the object of his calling me was for me to be a witness to what he would say to Mrs. Weston in regard to Richard; it was to the effect that in the event that he should marry and have children 'Dick' should share his property with them, and if he should have no children 'Dick' should be the sole heir, and, furthermore, he said he intended to take Dick to Europe to educate him; before this Mr. Jessup had asked me as to Mrs. Weston's health, and I told him she had been in delicate health and that Dr. G. G. Tyrrell was attending her; he told her that he would care for the boy, in reply to her questions; he said he thought it was not best that she should see the boy until he arrived at years of discretion, and she replied that she must be satisfied; he said that the boy was in boarding-school, but he did not say where; he said he

had always taken care of the boy, and she replied: 'I am satisfied with the care you have given the child'; Mr. Jessup told me at that time that she was in boarding-school and that he took her from there to the colored lady, where she was confined, and that her people knew nothing of it; he said he would care for her and that her people should know nothing of her; he said that his brother knew all about it; I said, 'Why did you give the boy that name—"Dick"?' I said it was a horrid name; he said the name was for his brother; he said, 'I have a brother in New York'; I was in the room about three hours; we were engaged in general conversation, in the course of which Mr. Jessup said that the boy had been living with a colored family, but was then at school or college; she said that she thought it was hard that she had not seen or could not see the boy; Mrs. Weston was with me over a year; after that she went from my house to Mrs. Henderson's, her niece; from there she went to her grave; she was never at San Francisco after she left my house; she was an invalid; I was with her in her last moments; she said, 'I will die very soon—I have only an hour; when I am gone, write to Mr. Jessup at the Palace Hotel that I am dead, and ask him to always care for Dick, for I know he will'; she gave me no other directions, only to write to Mr. Jessup; she died in about two hours; when she had the conversation with Mr. Jessup she was an invalid in very delicate health, only able to go to her meals; I had many boarders there, over one hundred boarders after my husband's death, on Third street, between L and M streets—the Landrum House; I was not a witness in the last trial—I was then in Los Angeles; I am sixty-two years old, born in Oswego county, New York State; Mr. Jessup said he had always treated the boy well and acknowledged him as his child, and told to the world that he was his child; this was at my house on the occasion already described; I heard from Mrs. Weston after she left my house, when she was on M street, at her niece's; also from San Francisco; at the conversation alluded to, Mr. Jessup said that his brother Ike had met her at the train when she came from San Jose; he said that his brother died on the way to New York, and that the child was named after the brother who died; I keep house in Los Angeles for my husband; he is a

searcher of records; married him three years ago; was married to first husband in 1860, in San Francisco; he was then county judge of Shasta; he continued in that office six years, when we moved to Sacramento; he practiced there a little, but his health was feeble, and I kept boarders until three years ago; first husband died about nine or ten years ago; he was dead when Mrs. Weston came to my house; I had not known her before; she was in the house about a year when the conversation occurred as stated; my husband had been dead over a year; I had thirty rooms and they were always filled; the conversation was between 9 and 10 in the evening; we made it a practice to go to each other's rooms before retiring, she to mine or I to hers; witness repeats the conversation as already narrated; I was surprised when she said that the picture was that of her child, because I understood that she had no child by Dr. Weston; it was a natural subject of conversation between women; she said the father had acknowledged the child and always cared for him; the picture was that of a boy about six years old in a kilt suit; the conversation lasted about an hour; I have related the whole of the conversation as well as I can from memory; we had another conversation on the same subject; and it was a common subject between us every evening; we talked frequently on that topic for something like a year, and it was very much the same all the time; I have stated all the conversation that took place with Mrs. Weston the first night she spoke about her child; the next morning she spoke again to the same effect; it was a common occurrence for us when we were alone to talk on that subject; I could not tell all the conversation that passed between us; my husband died the year of the 'high water' in Sacramento, which was 1879 or 1880, the same year that my present husband's father died; it was about a year and four or five months after Mrs. Weston came to my house before Mr. Jessup called; he was an absolute stranger to me; I had never seen him before; I only knew of him through Mrs. Weston; she told me the night before that he was at the Palace Hotel and had sent a telegram that he was coming up there; she told me either before or soon after Jessup's visit that he had had a brother whose name was Richard, who died on his way to New York; it was before he came that she told

me this, and that the boy was named for this brother; she told me also that Mr. Jessup was a rich man, and that he had a brother 'Ike,' who lived down here somewhere and who had met her on the ferry-boat when she came to San Francisco and went with her; this she told me a month or so before Mr. Jessup's visit to my house; she said that brother 'Ike' knew all about the affair, and that he had been a good friend to them and had helped them to keep the affair quiet from her people; she told me herself that she had been Josie Landis; in the conversation when he had been introduced to me by her he said that he had a brother Richard who died on the way to New York; it was about 10 o'clock when Mr. Jessup went into the room, and was about an hour when I was summoned to the room—that was between 11 and 12 o'clock; I was there about three hours; did not go to lunch; the lunch hour was 12 o'clock in my house, but on this occasion I did not go into the lunch-room. I asked them to have lunch, but they did not nor did I. Mr. Jessup left about 3 o'clock, came back about 5 and remained until 7 o'clock; our dinner hour was at 5. I was in and out of the room the second time; while he was in the room—Mrs. Weston's room—the first time, after awhile he removed his shoes and put on his slippers, excusing himself because of his feet hurting him; he seemed to be lame and not appearing well. I first heard of this case when I saw in a newspaper an account of the supreme court decision against the boy, and I said to my husband that I knew all about the case, and he wrote to the clerk of the court that he wanted the names of the attorneys, and so came about communication with them. Three years ago I was in Los Angeles, but saw nothing in the papers about the case; I did not learn from her what was her financial condition; she did not tell me about her courtship with Dr. Weston, nor how she met him; she told me that she had told the doctor that she had the child; she did not tell me that she told him who the father was; she told me that the doctor knew she had the child; I asked her no further question on that subject; she told me in our conversation; I could not remember at which conversation; she did not tell me of having any other suitor; she did not say in so many words that she was or had been engaged to Mr. Jessup, but she would have

married him if her parents had not interfered; she told me that she had corresponded with the nurse, but did not tell me her name; said they were colored people; she never told me anything about her having any lawsuit, litigation or claim against Jessup. I first heard of the death of Mr. Jessup when I read of the proceedings of the court against the boy, about three or four months ago; Mrs. Weston had no visitors, none except those in the house; Mrs. Henderson, her niece, came to see her; Stephen M. White, lawyer, of Los Angeles, informed me that I was wanted here in court and I came; he furnished me with means to come here; I came voluntarily without subpoena."

Taking this testimony as a whole, there is no reason why the court should subscribe to the censure bestowed upon it by the counsel for the respondent; on the contrary, it seems to me to bear the impress of truth and to be in itself consistent. Although the witness came at the "eleventh hour" and in the nick of time, sufficient reason is given in her testimony for not having come forward before.

It is impossible to refuse credence to this old lady's evidence; she is without motive to invent or exaggerate the facts related, and an impartial study of her statements in their integrity enforce acceptance of her narrative.

Counsel (Mr. Delmas) contends that the testimony of Harris Joseph (the substance of which is incorporated in parentheses in the abstract hereinbefore made in this opinion) should be rejected by the court as intrinsically incredible, utterly untrustworthy, as to the new matter concerning the alleged visit of Isaac Jessup with the boy to his store. But I am at a loss to understand upon what basis such rejection should be made, for the witness is a man of credit and character unimpeached, and wherein his story is inherently improbable is to my sight imperceptible; even if this were true, however, says counsel (Mr. Delmas), it would not be evidence of public acknowledgment, while it might tend to prove reception into family under the decision of the supreme court. It seems to me that under the law, as laid down for the guidance of this court, it tends to prove both. It was an acknowledgment and it was in public, and it was in the pres-

ence of and a recognition by a member of the family of decedent.

The testimony of Gustave Videau, while admitted to be new, is claimed to be only cumulative; in this claim I cannot agree with counsel, nor am I able to accept as applied to this issue his notion of what constitutes cumulative evidence. This is additional and corroborative evidence, and, to the end that the testimony itself may afford the basis for a conclusion as to its character, it may be epitomized in this place.

Gustave Videau testified that he was born at Marysville, California, in 1856, lived in San Francisco since 1867, worked for F. Chevalier in 1880, afterward for ex-Mayor William Alvord, one of the Police Commissioners, in the rolling-mills, thence on the police force from 1882 to 1888, six years; was at Santa Clara College from 1868 to 1875, then to Heald's Business College and to business; from 1884 to 1885 witness' police patrol was from First to Fourth streets, Stockton to Taylor and Sixth streets; knew Gershom P. Jessup; first saw him in Marysville, afterward in San Francisco; first at the house of witness' mother; then on California and Sansome streets; then on Market street, and on several other streets; usually spoke to him; the father of witness kept the Barnum restaurant, French restaurant, in Marysville, where Jessup used to eat; Jessup was in the habit of calling witness "Gustave"; father of witness died in 1873; witness met the young man Richard on Market street, the first time with Mr. Jessup in about the year 1885; his father introduced witness to Richard and said: "This is my son Richard"; it was between 8 and 9 o'clock at night; witness saw them together afterward on Market street maybe ten or eleven times; witness saw Gershom Jessup walking with a cane; he walked as if lame, sometimes with his left hand on his hip; sometimes Richard had his arm in his father's; Gershom Jessup told witness once that he had Richard at school. It was in the summer of 1882 that witness saw Gershom Jessup on the corner of California and Sansome streets; on cross-examination witness said he did not recollect that Gershom Jessup ever mentioned any name in connection with the boy, Christian or surname.

It seems to me that this testimony is more than merely cumulative; it adds something new to the case; it is a public acknowledgment; it presents father and son arm in arm, "in the public ways." In sight of men and women he took this child, and by his conduct proclaimed his paternity and published his acknowledgment.

The testimony of John C. Flood disposes of the evidence of Dr. Marc Livingston with reference to the statement of the petitioner, taken down in shorthand and typewritten. I do not attach much importance to this circumstance in any event; but, whatever importance it might have, it is significant that, although the tenor of the testimony was known at the first trial, Dr. Livingston was not produced as a witness for respondents.

A suggestion from this testimony is that there was a design to obtain control of the person of petitioner, based upon the belief in the purity of his pretensions to progeny from Gershon Jessup. I think this is fairly inferable from the testimony of Mrs. Nancy Maria Greeney and Mrs. Etta Koppel, and the letters said to have been written by the latter or at her instance to San Rafael.

It is contended that the court has no jurisdiction to entertain this petition, because the petitioner did not come in under section 1307, Civil Code.

This point was made also in the supreme court, and was answered in the first opinion quite summarily by Mr. Justice Works (81 Cal. 458), and in the second and prevailing opinion it did not receive any attention at all.

It is urged strenuously by counsel for respondent that petitioner should have testified in his own behalf on his trial, and that it is irresistibly inferable from his reticence that he could not contradict the witnesses produced against him, and that there is no excuse reconcilable with the validity of his claim for his refraining from testifying; counsel (Mr. Delmas) says that the petitioner has deliberately sealed up the most authentic source of information on the point of paternity—his own lips—and no other motive can be ascribed to his silence, save an inability to contradict the witnesses against him or to corroborate those in his favor. In answer to this, counsel for petitioner (Mr. Barnes) has said with force that he ad-

vised this course from the fear he possessed of the kind of adversaries with which the petitioner had to contend, such as the detective who forged a letter to entrap the witness Winter. This detective is he who confessed that the whole matter of his representation to Winter was a figment of his imagination, and that he was guilty of deception, forgery and fraud for the purpose of ensnaring that witness (see page 73, judge's manuscript notes). The counsel (Mr. Barnes) says that it was because they had such instruments to oppose them—kidnapers and forgers and desperate detective agencies—the counsel for petitioner had to fear for a poor and friendless youth confronted by power and wealth. This is his answer to counsel for respondent, and whether it be sufficient an examination of the entire record will show. Certainly his counsel had a right to apprehend harm to him in such circumstances, and had reason to rely on the strong case made in his favor by uninterested evidence. In my judgment the claim of the petitioner is now made out on both issues, and according to the law of the case, as established by the appellate tribunal.

For a Discussion of the Questions Involved in the Principal Case, see 1 Ross on Probate Law and Practice, 164-169.

ESTATE OF JAMES WHARTENBY, DECEASED.

[No. 10,068; decided November 6, 1891.]

Taxes Against Estate—Payment Before Distribution.—A tax is due immediately after it is levied, within the rule that distribution must not be made until all taxes due from the estate are paid.

Taxes Against Estate—Payment Before Distribution.—Section 3752 of the Political Code and section 1669 of the Code of Civil Procedure should be construed together as simultaneous expressions of the legislative will; the former section does repeal the latter by implication.

On October 8, 1891, the executors of the will of the above-named decedent filed a petition for distribution and their final account. Upon the hearing of the petition and settlement of

the account the executors filed a supplementary account pursuant to section 1665 of the Code of Civil Procedure. In this supplementary account the executors made a statement of the taxes assessed against the estate upon three classes of property:

1. Taxes on mortgages held by the estate on the first Monday in March, 1891, and thereafter paid.

2. Taxes on land belonging to the estate on the first Monday in March, 1891, and thereafter sold; some of which sales took place before the tax rate was fixed and the amount of the tax was ascertainable.

3. Taxes upon property in the hands of the executors at the time of distribution.

The question presented to the court was whether the estate or the purchaser must pay the taxes on the property sold in process of administration after the first Monday in March.

A. N. Drown, for the executors.

Reuben H. Lloyd, George H. Mastick and Harold Wheeler, for various heirs.

Alfred Barstow, for the purchaser.

COFFEY, J. Section 3752 of the Political Code says: "No decree of distribution must be made by the court until all the taxes due are paid." Section 1669 of the Code of Civil Procedure says: "No decree of distribution must be made by the court until proof by affidavit or otherwise is made that all taxes upon personal property are paid."

I have made but one construction of that since I have been in this probate department—that it is the duty of the court to see that *all* taxes that are *due* are paid. Of course the word "due" as in the code means something, because the taxes may be levied and not be yet payable; and it is not incumbent upon the court, as some think, to make a reservation of money for the payment of taxes that are not yet due. Section 3752, Political Code, was passed and took effect in March, 1880. Section 1669 of the Code of Civil Procedure took effect in April, a few days subsequently. Now, instead of reading those two sections together, and reconciling and construing them as if made simultaneously, some judges have

said that section 1669, Code of Civil Procedure, being a little later in time of enactment than section 3752, Political Code, repeals it by implication, and by necessary implication limits the obligation of the court to seeing that the payment of the personal property tax alone has been made. That point has been made, and seems to have obtained currency in some other sections of the state.

"I have a question before me," said a judge in another county, "involving the construction of section 1669, Code of Civil Procedure, and section 3752 of the Political Code. The administrator has asked for a decree of distribution, and says that he has paid all taxes on the personal property of said estate, but on the first Monday of March, 1891, the estate owned real estate but sold it in July of that year. An objection here filed to this account in opposition to the decree, is made by the purchaser of said real estate, because the administrator refuses to pay the taxes on said real estate. My predecessor in office has always held that a decree of distribution would be granted on paying taxes on personal property of said estate; that section 1669 was the last expression of the legislature, and repeals section 3752 of the Political Code by implication; holding that any other construction of the said statute would hinder the winding up of the estates of deceased persons." I do not think that last clause quoted of this letter, being a mere matter of convenience, has any force, and neither do I think (although the gentleman who so held is a judge of large experience and a lawyer of recognized ability and many years' practice) the last section repeals the first by implication. The law does not encourage implications. I have always construed these two as being applied together.

I wrote yesterday or the day before to this gentleman, my colleague in another county, that I had always regarded the rule—taking these two statutes together—as the simultaneous expression of the legislature; that I thought it was the intent, in the interest of the state of California, to have the court see that the taxes were discharged before the estate was distributed, upon this principle; that it was the duty of the court to see that all the valid obligations of the estate were discharged before the decree of distribution was signed, or

before the executors were released. That was a valid obligation of the estate. Until the executor could produce vouchers showing that all the taxes were paid, the court might withhold the decree of discharge. This is the theory on which I have acted. That was a debt which the estate owed. It is the same as any other debt which it incurred, or any other claim, which the estate is bound to pay. That is my judgment about it. I stated to my correspondent, at the same time, that I had never made a specific ruling upon the point, because no resistance had ever been made to the suggestion of the court. Of course, there has sometimes been an evasion. Then I insisted upon the production of vouchers and the vouchers were produced, and there was no further contention; that is to say, no controverted question has arisen until now as to the construction of the statute.

According to one section of the Political Code (section 3642), the tax may be entered against the heirs or the executors—that is, against the estate, the heirs, or the executors or administrators—showing that what the legislature was aiming at is the estate, and what it relied upon is the estate itself, for the payment of the taxes. Immediately the tax is levied against the estate, it is an obligation due from the estate to the state, and therefore it is proper for the court, acting on behalf of the state, to see that the tax is paid before the distribution is made.

The superior court must require every administrator or executor to pay out of *the funds of the estate* all taxes due from such estate. All we have to inquire is as to the meaning of those words—whether the taxes are due from the estate, were the taxes *due* from the estate prior to this sale. Now, the only question that I regard as a point of any consequence is, Is that section by necessary implication, repealed because the section of the Code of Civil Procedure was passed a few days later?

I think the estate is liable.

As a matter of fact, the purchaser was sold a good title, free from all liens, including tax liens. He had every right to assume that fact by the construction of the code, which is the correct one, at least, that the court had or would enforce payment out of the funds of the estate.

The tax is the same as a judgment lien and levy; and, therefore, if this decree of distribution is now made without requiring the payment of the taxes by the executor, the state can collect from the purchaser, and then the purchaser has recourse to the executor, if he is not protected by the court. That is where the practical proposition comes in. I think the amount in the account charged for taxes should be paid out of the funds of the estate, and it is allowed, and the executors are authorized and instructed to pay the same.

ESTATE OF FRANZ E. BEHRMANN, DECEASED.

[No. 11,397; decided March 28, 1892.]

Wills.—Every Portion of a Will must be Made to have Its Just Operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.

Wills—Transposition of Words.—Words or Clauses of Sentences, or even whole paragraphs of a will, may be transposed to any extent with a view to show the intention of the testator.

Wills.—An Interlineation in a Will is the Most Significant part of the line, and where a clause as originally written is clear, and the testator subsequently makes an interlineation, it must be assumed that he intended to make the sentence convey a meaning which it did not theretofore express.

Wills—Interlineations—Death of Legatees.—Where two legatees named in a will died after its execution, and the testator thereafter noted the fact of their death in his will, and the sums bequeathed to such legatees equal the amount which will go to other legatees if effect is given to an interlineation in that part of the will containing the bequests to them, the inference is strong that by such interlineation the testator meant to transfer to such legatees the bequests originally made to the legatees who died after the execution of the will.

Wills—Construction in Favor of Validity of All Parts.—Where a testator has heirs, and his language will admit of two constructions, one of which will make all the provisions of the will valid, and the other of which would result in creating a legacy to a charitable society in excess of one-third of his estate, which legacy would be void as to such excess under the statute, it will not be presumed that he intended to make a partially invalid bequest, and the court will adopt that construction which is in harmony with the law of wills.

Franz E. Behrmann died on September 19, 1891, and on October 23, 1891, Isaac Hecht, then president of the General German Benevolent Society, was appointed executor of his last will. On March 2, 1892, the executor filed a petition for distribution wherein he requested the Court to construe the clause of the will separately set forth in the opinion of the court.

A. Heynemann, for executor.

Robert Harrison, for certain legatees, children of H. H. Behrmann.

COFFEY, J. The contention here is upon the construction of a single clause in the will.

Do the children there named take \$500 each, or \$500 divided between them, under the clause in the will:

to each

"And \$500 (five hundred dollars) in equal parts, to Anna and Christina and Heinrich Behrmann, the other children of Hans Heinrich Behrmann, payable when the youngest, Heinrich, is 21 years old, with interest."

The will is olographic, written in the German language with pencil, with erasures and interlineations in penciling of different colors, and with an original date erased and a subsequent one interlined. A translation is here inserted:

"1st of April 1880.

"San Francisco, the 1st of October, 1879.

"I, Franz Ernst Behrmann, in full intellect and good health, determine hereby that after my death, as follows, about my property and money disposed, be
as follows:—

German

~~I bequeath to the General Benevolent Society \$500, five hundred Dollars, payable as soon as possible~~

"My brother, Hans Heinrich Behrmann, now residing
Hall's Ranch Cal.
at Duplin Alameda County, \$5 (five dollars), to his son, Franz Ernst Behrmann \$500 (five hundred dollars), payable when the same is twenty-one years old, with interest

what the five hundred dollars have produced, and \$500
to each

(five hundred Dollars) in equal parts, to Anna and Christina and Heinrich Behrmann, the other children of Hans Heinrich Behrmann, payable when the youngest, Heinrich,

dead
rich, is 21 years old, with interest. And my sister, ~~Margaretha Behrmann~~, married with Heinrich Bade, now residing at Pleasanton, Alameda County (Cal.), \$500 (five hundred dollars), payable as soon as possible, and the daughter of Heinrich Bade, and Margaretha Bade, nee Behrmann, called Margaretha Bade, \$500 (five hundred dollars), payable when the same is 21 years old, with in-

dead
terest, and my father, Johann Heinrich Behrmann \$500 (five hundred dollars), should the same be dead when I die, ~~it shall fall to the General German Benevolent Society at San Francisco.~~

"And my brother Johannes Behrmann, living in the Hollm, Hollstein, \$500, payable at once.

"And to the Mrs. Anna Theiss, or Mr. Heinrich Theiss, \$300 (three hundred dollars), payable at once, and what is then still on hand to the A. D. U. Society.

"I appoint as Executor the present President Mr. Julius Bandmann or his successors of the General German Benevolent Society.

"F. E. BEHRMANN.

"The watch and chain shall go to F. E. Behrmann, the son of Heinrich Behrmann."

No question has been raised save that of the meaning of the above-quoted clause; it being conceded that the intent of testator, so far as expressed in or to be gathered from the will, shall govern.

"There is perhaps no rule of construction of more universal application to wills, or which oftener requires to be acted upon, than that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.

"There is no more clearly established rule of construction, as applicable to wills, than that words or clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator. . . . Where it gives effect to all the provisions of the will, and renders them all harmonious and consistent, both with each other and with the general purpose and intent of the will, it affords very satisfactory ground of presumption that it reaches the source of the difficulty and explains the mode in which it arose": 1 Redfield on Wills, p. 431.

The clause, "without the interlined words," very accurately, precisely and plainly gives the children \$500, to be divided between them "in equal parts." The clause did not require—would hardly permit—anything additional to make that meaning plainer to a mind of ordinary intellectual capacity.

We must, therefore, assume that the writer intended by the interlineation to make the sentence convey a meaning which without the interlineation it did not express.

An interlineation is the most significant part of a line. In reading the sentence as first written, the writer discovers uncertainty, ambiguity or a declaration the very reverse of his intent, and then, necessarily alert and deliberate, and cautiously accurate to the extent of his power of expression, interlines the word or words necessary to make his meaning plain. The interlineation thus made becomes the very accentuation of his meaning. Under the rule of law before cited we must give the interlined words their due meaning as part of the sentence, and herein,

1. The meaning of the original clause was to be affected by the interlined words;

2. If the original sentence was ambiguous, the interlineation may have been for the purpose of making it clear, but,

3. If that sentence was already clear, the interlineation must have been made for the purpose of changing or reversing that clear meaning.

What change of meaning was intended to be made by the interlined words?

The testator had evidently computed the value of his estate.

Originally he gave money legacies aggregating \$3,805, including a specific sum of \$500 to the German General Benevolent Society. Afterward he made the following changes:

First. Erased specific bequest to the Benevolent Society, and made it the residuary legatee: "What is then on hand."

Second. Interlined fact of his sister's death and erased her name.

Third. Interlined fact of his father's death.

Fourth. Erased provision that lapsed legacy to father should "fall" to General Benevolent Society.

Fifth. Interlined the words "to each" after bequest of "five hundred dollars" to Behrmann children.

The "first" change shows (1) that the extent of testator's contemplated bounty to the General Benevolent Society was \$500, and (2) that in case of insufficiency of assets the society should be the first sufferer.

The "second" change merely shows his knowledge of his sister's death, and that he now has \$500 either undisposed of, or to go to the residuary legatee.

The "third" change evidences his knowledge of his father's death, and that now he has another \$500 thrown back to him which will "fall" to the General Benevolent Society unless the will be further changed.

The "fourth" change indicates an intent that the lapsed legacy of his father shall not "fall" to the society. But, despite that seeming intent, the lapsed legacies will "fall" to the General Benevolent Society as residuary legatee unless he otherwise disposes of the lapsed sums.

The "fifth" change disposes of those sums.

Bearing in mind that the testator's intent to limit his benefaction to the General Benevolent Society to the sum of about \$500 is very plainly to be inferred from the will, the significance, intent and meaning of the fifth change is evident.

Testator finds that by the death of his sister \$500 is thrown back to him to be otherwise disposed of. Later, that by the death of his father another \$500 destined for his own blood is left without a specific donee. He thus realizes that \$1,000, intended for his own people, will go to a miscellaneous charity unless otherwise disposed of. Now is the moment of final consideration.

All the legatees who were specially provided for—all save the residuary charity which is to get “what is then left on hand”—are his kith and kin; his father, his brother, his sisters and his brother's or sister's children. He had divided his little fortune with as much evenness as the limits of that fortune would permit. It was \$500 all around, save to the younger Behrmann children. To give \$500 to each of the others and have something approaching a like sum still “left on hand” for the Benevolent Society, he had been obliged to give his favorite sum of \$500 “in equal parts” to them. But he now perceives that he may give \$500 “to each” and still have “left on hand” something over \$500 for the society. There is an unexpected surplus of \$1,000—what shall he do with it? Let it go to a general miscellaneous charity, the beneficiaries of which must necessarily be to him entire strangers, even their identity always unknown, or shall he give to his own—the blood of his father and of his mother—whom before he had been obliged to discriminate against in his bounty? He is no longer obliged to so discriminate. He may now place each of those children on a par with his other nephews and nieces, and still have sufficient left for his outside bounty—to satisfy his intellectual fad of providing for a public charity, and yet respond to his heart promptings towards his own. He did not hesitate nor consider long. The same pencil that interlined above his father's name, “dead,” and erased the line giving that dead father's legacy to the Benevolent Society, interlined over “\$500” that “to each” of his brother's children that equal sum should go.

Does not this interpretation “give effect to all the provisions of the will, and render them all harmonious and consistent, both with each other and with the general purpose and intent of the will”? And does it not “afford very satisfactory ground of presumption that it reaches the source of the difficulty and explains the mode in which it arose”?

The calculations of the testator as to the extent of his estate proved very accurate. The estate was appraised at about \$4,300, and Mr. Isaac Hecht, president of the German Society, the careful and prudent executor of his will, now reports a cash balance, ready for distribution, of \$3,971. With the

total legacy list of \$3,305 paid, a residue of \$666 will still be "left on hand" for the residuary legatee.

Does not this interpretation prove itself—even to a demonstration?

The interpretation sought, or suggested, by the residuary legatee is based upon a strict grammatical construction of the sentence, "after it had undergone some significant changes," thus: "and five hundred dollars to each in equal parts, to Anna and Christina and Heinrich," etc.

The obstacles to that interpretation, under the rules quoted from Redfield, are many. Among them are:

1. It dislodges from its proper position of prominence and significance the interlined words "to each."

2. It gives no weight to the fact that those words were interlined some time after the body of the will had been written—probably with the same pencil which had expressed testator's knowledge of his sister's and his father's death.

3. It gives no consideration to the fact that the sentence "without the interlined words" very accurately and plainly expressed the meaning claimed by that interpretation. It would necessarily ignore the words "to each," either as interlined words, or as part of the sentence as originally written, and thus violate the rule that each word "must be made to have its just operation."

4. It interpolates a comma. In the circumstances it might, with no less violence, supply a whole sentence.

Give to counsel for the children the control of the comma, he would place it thus: "and five hundred dollars to each, in equal parts to Anna and Christina and Heinrich," etc.

There is no ambiguity in the meaning of the sentence so punctuated, whether the words "to each" have been interlined or placed in line when first written.

A like sentence in the will of Mme. Bertha Berton did not give the court even a question as to its meaning: Estate of Bertha Berton. "I desire to give to my only two beloved children . . . the summe of ten thousand dollars each, share and share alike." The court says: "In the will above quoted it appears that, after giving to each of her children ten thousand dollars, she undertakes," etc.

With an ambulatory comma, which could have been stopped at "dollars," so as to precede instead of follow the word "each" in above sentence from Mme. Berton's will, what a changed meaning that sentence would express. And suppose that Mme. Berton, like Mr. Behrmann, had used no commas at all?

5. It is not consistent with the erasure of name of General Benevolent Society from the provision that legacy lapsed by death of father should "fall" to that society, made by testator after learning of his father's death.

6. It is not in harmony with the general purpose of testator, expressed throughout whole will, to provide primarily for his own kin, and secondarily, only, for a public charity to the maximum extent of \$500, when we contemplate that testator knew of the lapsing of \$1,000 at or before he made the various erasures and interlineations noted.

7. It applies strict grammatical rules to an ungrammatical will.

It is apparent that testator was not a man of accurate literary expression. He was either careless or unskilled in phrasing, or imbued with that not uncommon superstitious reverence for one's last testament which considers even its touching, much less its tampering with, a sort of sacrilege to be committed only when, and to the extent, absolutely necessary. Instance:

a. Erases sister's name, but leaves bequest to stand.

b. Merely marks "dead" over father's name, leaving bequest to stand.

c. Merely erases name of German General Benevolent Society from provision, making lapsed legacy of father fall to it, leaving remainder of sentence to stand without meaning or relevancy.

d. Uncertainty of bequest to the Theisses.

e. Uncertainty as to identity of residuary legatee: "what is then left to the A. D. U. Society." (Allgemeine Deutsche Unterstutzungs Gesellschaft.)

f. Uncertainty of identity of executor of his will, which required decree of this court to determine it, which decree was in favor of Mr. Hecht, the present president of the German General Benevolent Society.

It does not seem to have occurred to counsel that a view contrary to that of the court would have given to the residuary legatee, a charitable society, an amount in excess of the statutory limitation. If Mr. Heynemann's interpretation be the true one, then more than one-third of the estate would be bequeathed to a benevolent purpose, contrary to the force, form and effect of the statute in such case made and provided: Civ. Code, sec. 1313.

This is a mere matter of mathematics, easily solved by reference to the amount of the estate and of the residuum according to Mr. Heynemann's construction.

The foregoing views having been adopted by the court, a decree of distribution in accordance therewith was made.

In Reading a Will Courts do not Hesitate to Transpose Words, supply omitted ones, and reject those that are repugnant, when necessary to do so in order to give effect to the evident meaning and purpose of the testator: Estate of Wood, 36 Cal. 75; Mitchell v. Donohue, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614; Estate of Stratton, 112 Cal. 513, 44 Pac. 1028; Dickison v. Dickison, 138 Ill. 541, 32 Am. St. Rep. 163, 28 N. E. 792; Rose v. Hale, 185 Ill. 378, 76 Am. St. Rep. 40, 56 N. E. 1073; Gilmor's Estate, 154 Pa. 523, 35 Am. St. Rep. 855, 26 Atl. 614. However, a court cannot reform a will after the death of the testator: Estate of Callaghan, 119 Cal. 571, 51 Pac. 860, 39 L. B. A. 689; nor can it transpose words or provisions therein so as to change the import and meaning, when the intention of the testator can be discovered from an examination of the instrument as it is written: Estate of Schedel, 73 Cal. 594, 15 Pac. 297; Adair v. Adair, 11 N. D. 175, 90 N. W. 804.

ESTATE OF WILLIAM P. FULLER, DECEASED.

[No. 9747; decided August 24, 1892.]

Minor Heirs—Appointment of Attorney.—The court will not exercise the power conferred upon it by section 1718 of the Code of Civil Procedure to appoint an attorney to represent minor heirs, except in cases where it is manifestly necessary; and in no case upon the suggestion of an executor or administrator, or other person in possible adverse interest to the parties sought to be represented.

Minor Heirs—Duty of Their Attorney.—It is the duty of an attorney appointed by the court for minor heirs to call to the court's attention the failure on the part of an executor to comply with any re-

quirement of the statute, and it is not for him to construe or interpret apparently imperative clauses of the statute as merely directory.

Minor Heirs—Duty and Compensation of Attorney.—There is a wide difference between the attorney employed for an estate and an attorney appointed by the court to represent minor heirs, and their compensation is not to be measured alike.

Minor Heirs—Duty and Compensation of Attorney.—The attorney for an executor is employed and is allowed compensation to manage the legal affairs of the estate, and is accountable for the proper performance of his duties as such attorney; he prepares all the papers and appears as the principal representative in the court; while an attorney appointed by the court to represent absent or minor heirs is an auxiliary of the court, and his service is in a sense subordinate. He acts as scrutinizer of the affairs of administration, a challenger and critic of the management of the estate, and is expected to advise the court from time to time as to any default or dereliction on the part of the administrator or executor.

Minor Heirs—Compensation of Attorney.—The compensation awarded an attorney appointed by the court to represent minor heirs should be charged against the persons whom he represents and not against the body of the estate, even though the executrix assents to the charge; and such compensation should be in proportion to the interest represented, although the estate as a whole may incidentally benefit by the service.

Attorney Fees.—Opinions of Attorneys as to the Reasonableness of demands for compensation for legal services afford no real assistance to the court's judgment.

Timothy J. Lyons, for the applicant.

A. G. Booth, for the executrix.

• John Flournoy, for one of the adult heirs.

COFFEY, J. Mr. Lyons was appointed by an order of this court, dated June 13, 1890, to represent certain minor heirs of decedent in proceedings in probate of will and administration of estate in this department.

Prior to his appointment Mr. Lyons appears to have been consulted by, and to have communicated with, the attorney for the executrix, and to have acted in anticipation of his appointment by the court. This appointment seems to have been assumed, notwithstanding the rule of this department then, theretofore, and ever since hitherto in existence:

“The court will not make appointments of attorneys for absent or minor heirs except in cases where it is manifestly

necessary, and in no case upon the suggestion of an executor or administrator, or other person in possible adverse interest to the party sought to be represented. The judge of the court prefers to use his own judgment, without being hampered by solicitation or importunity."

Despite this rule based upon reason and experience, Mr. Lyons applied to the court in a letter of which a copy is here inserted:

"San Francisco, June 4, 1890.

"Hon. J. V. Coffey,

"May it please your Honor:

"In the matter of the estate of W. P. Fuller, deceased (the will having been filed for probate a few days ago), there being a strong desire on the part of the attorney for the mother of the minor children to have me represent the mother as guardian of her children; but the mother being also the executrix under the will, her attorney did not think it advisable to have her placed on the record in a double—in fact a triple—position, as executrix, widow and guardian; and he would therefore prefer to have the attorney representing the minors' interest be the representative of the Court, and not as the representative of the mother as guardian. The attorney for the mother, Mr. A. G. Booth, called on me to-day and stated: That his firm filed the will for the widow and will have to represent her in that capacity; that the estate is a large one, and as there will perhaps be a number of interesting questions naturally arising under the will and certain partnership articles, the children should be separately represented, and he had hoped to have my help if possible; that he was Mrs. Fuller's attorney, but if guardianship proceedings were taken out he could not act, but would recommend and consent to me acting for the widow as guardian; that he would prefer, however, not to have guardianship opened, as it would place the widow in two or three opposing positions; that the appointee of the Court could protect the children as well as a guardian, and with more impartiality than as the representative of the widow; that at the end of the administration the widow can take up the keys as guardian under the appointment of the will, naturally, after the interests of all heirs and devisees have been settled in the administration and upon distribution.

Mr. Booth, knowing your Honor's disinclination to receive suggestions as to appointments, refrains from stating the matter to your Honor, which he would otherwise do, and called on me to explain that fact, and to also explain that he did not want to advise guardianship proceedings, because not deeming them necessary—at this time, at any rate—and something to be avoided, as a conflict of interests; unless your Honor appoints somebody for the children. I have taken the liberty to state this matter to your Honor, although I have always refused to say anything (which I might have done in some cases) in any matter that might appear to be even an intimation of a desire to have your Honor set aside your general rule as to the matter of appointments.

"In this case I have only done so because if the attorney for the mother consented to have her apply for guardianship, he is willing to have it understood that he would recommend my appearance as her attorney; and he will say, if your Honor cares to set aside your rule, that it is the wish and desire that I may appear for the children. Of course I have submitted this letter, hoping your Honor will believe that I regret the appearance of it being an intrusion on what is known to be a well recognized rule of action by your Honor in the awkward duty of appointments, where you can rarely see the true inwardness of any particular desire or suggestion of this kind. The matter came to me in such a complimentary way that I have not been able to resist what may appear a great impertinence; but I trust your Honor believes I desire you to act perfectly free.

"Very respectfully,

"(Signed) TIMOTHY J. LYONS."

"The foregoing is a true copy of the letter received by me from Mr. Lyons. J. V. COFFEY."

Court Exhibit X, offered and read in evidence at 4:30 P. M., July 21, 1892.

If proof were necessary to show the propriety of this rule, it is afforded by the circumstances of this claim for compensation.

Mr. Lyons was appointed in deference to the supposed desires of the family, as indicated by their attorney; although

the widow executrix testified upon the settlement of the account that she knew nothing about his appointment until his appearance in court (June 13, 1890), and expressly repudiated all responsibility for the suggestion of his name to the court or for the acts of her attorney antecedent to the appointment; but the letter hereinabove inserted speaks for itself, and her attorney has not denied the substance of its statements.

Mr. Lyons has filed a voluminous document entitled "Verified statement of services rendered by Timothy J. Lyons as attorney appointed to represent the minor children of decedent."

This is doubtless designed to comply with the rule of this department requiring applications for allowance of counsel fees to be made in open court, and obliging attorneys to present with their applications a verified and summarized statement in writing of services rendered, and exacting that notice be given to all parties in interest.

I have examined carefully this document, which is largely in the nature of an argument in support of the allowance asked, and is devoted mainly to the work done in and about the sale and confirmation of the partnership interest in the business of Whittier, Fuller & Co., to W. P. Fuller, Jr.

Mr. Lyons rendered valuable service in that connection and is to be commended and compensated therefor; but I feel free to say that his estimate of his share in the salvation of the estate from the foray of Whittier is exaggerated. He did his work well; but possibly the court would have resisted the raid of the surviving partner without the aid of any appointed attorney, as it has done in other cases, sometimes even against the assent of appointed attorneys.

Be this as it may, it is far from the purpose to depreciate the value, much less to disparage the character, of the services rendered by Mr. Lyons, and his ability as an attorney was attested by the act of appointment.

It seldom falls to the lot of the court, indeed, to bestow so signal a credential of capacity or character as was conferred in this case; and, whatever difference of opinion may exist between court and counsel as to the amount of allowance that should be granted, it does not argue a loss or lack of confi-

dence in the court's appointee, but merely an inability of the court to accept the large views of lawyers who travel on the broad gauge of professional practice instead of being confined to the narrow rut of official emolument.

On the hearing of the account the court adverted to the omission of the executrix to file an exhibit under section 1622, Code of Civil Procedure, and also to her failure to file the account provided for by section 1628, Code of Civil Procedure. No sufficient explanation or excuse was vouchsafed for these acts of neglect on the part of the executrix or her attorney, and the counsel, who by courtesy appeared for the applicant here, seemed to treat these matters lightly and suggested that the bar generally regarded these provisions of the statute as merely directory. That may be, but among the duties of an appointed attorney an important one is to prevent such slips on the part of the court's officers and to call to the attention of the court a failure to pursue the prescriptions of the statute, and it is not for him to construe or interpret apparently imperative clauses of the code as "merely directory." It is to be presumed, notwithstanding any loose general practice to the contrary, that it is the purpose of the law to compel its ministers to act punctually and promptly, and not to wrest its provisions from their obvious meaning to suit their own private interest or personal convenience.

In this case much mischievous misunderstanding might have been avoided if the sections cited had been complied with according to their letter and spirit; and the court would have had an opportunity of arresting by its action some of the acts complained of by the appointed attorney in his very rigorous examination of the executrix. But there is reason to fear that the relations between that attorney and the executrix and her managing son, W. P. Fuller, Jr., were then so amicable as to deter him from demanding that she furnish the exhibit required by section 1622, Code of Civil Procedure, and the first annual account under section 1628, Code of Civil Procedure, and this shows strongly the sound reason of the rule of this department against interference by the administrator or executor with the prerogative of the court in making appointments. Instead of holding the executrix at arm's-length and taking care that she should obey the obli-

gations of the statute governing her office, the appointed attorney was expecting to be employed directly by her in litigation outside this department in conjunction with other counsel (whose claims have been disallowed in toto) and had actually accepted a "retainer" of \$500 from her managing son, W. P. Fuller, Jr., in such behalf; this sum has been disallowed, also, by the court, as of course there could be no such thing as a retainer to an appointed attorney at any time, much less at a point nine months after he was intrusted by the court with the appointment; and there was no authority or order for its payment in any other function. Clearly there is a misconception of duty here, either on the part of the counsel or the court, for to the court it seems that if the counsel had not been affected by the prospect of employment in the litigation outside the probate department, he would have been disposed to demand a more careful compliance with the law by the executrix; but his feelings towards her were softened by the fact that she was, in a measure, the source of his appointment, and the further fact that he had reason to believe that he was retained by her managing son, W. P. Fuller, Jr., in litigation in another court or department; and his application for so large a sum, by way of compensation, seems to me to be based upon services rendered in that regard. The purely probate services cannot be appraised by me at any such figure. It is suggested that larger fees have been granted in other estates; but counsel could not find a case in which an attorney occupying the relation of Mr. Lyons to this estate received so colossal a grant; although, in a manner more ingenious than ingenuous, instances were cited where principal attorneys received apparently large fees; but the allowances to appointed attorneys were not and could not have been brought forward, although such attorneys have been well paid; but the difference between the situation of an attorney employed for the estate and charged with the major or entire responsibility of its administration, and an appointed attorney answerable only to the court whose agent he is, is very great, and their compensation is not to be measured alike; although there may be instances in which the appointed attorney is more competent than the attorney employed by an administrator or executor (no such suggestion

is made in this estate); but usually the appointed attorney is regarded as an intruder, and is by no means welcome, but accepted surlily because he is supposed to be a part and parcel of probate patronage, which the court desires to dispense at the cost of an inheritance, and not in the exercise of a prerogative which should be jealously guarded and most discreetly exercised.

The attorney for the minor heirs requests that whatever award the court may make to him be charged against the estate; and the executrix, speaking through her counsel, assents to this request; but the court declines to charge the body of the estate for a service performed for certain specified heirs. It is said that the estate as a whole was benefited by the appointment and the service rendered in pursuance thereof. This is an incident naturally flowing from the appointment, and should not serve as an excuse for an appropriation larger than would be deemed reasonable or proportional to the interest specifically represented. Mr. Lyons was not, and could not have been, appointed to represent the estate. The attorney for the executrix was employed and is allowed compensation to manage the legal affairs of the estate. He is accountable for the proper performance of his duties as such attorney. He prepares all the papers, appears as the principal representative in the court, is looked to by the court as responsible for the conduct of the legal affairs, while the appointed attorney is an auxiliary of the court, and his service is, in a sense, subordinate. He acts as a scrutineer of the affairs of administration, a challenger and critic of the management of the estate, and is expected to advise the court, from time to time, as to any default or dereliction on the part of the administrator or executor. In this way his relation is subsidiary, and he can hardly hope to hold himself out as entitled to an amount of allowance equal to the principal attorney, let alone, as in this case, to double that sum. Mr. Lyons, appointed attorney, asks for \$15,000; Mr. Booth, attorney employed for estate and executrix, is content with one-half that amount—\$7,500. Mr. Booth considers that Mr. Lyons should receive no more than \$3,000; Mr. John Flournoy, representing by employment an adult absent heir, thinks \$1,800 a good figure. Mr. Flournoy's estimate is too low and,

perhaps, made without an adequate knowledge of the labors of Mr. Lyons. Mr. Booth's figures are fairer and based upon more accurate acquaintance with the character and value of the attorney's work; but still he is under the mark. The court invited the opinion of these gentlemen because they were engaged in the estate, and, inasmuch as they objected to the allowance asked, it was their right and duty to speak out. It has been intimated that, if the practice of this department were not opposed to it, attorneys might be called in to prove up the reasonableness of the appointed attorney's application. No doubt. Nothing could better exemplify the inutility of such testimony than the ease with which professional gentlemen can be found to support such claims by expert evidence. This department of the superior court has steadily set its face against such testimony for, at least, two reasons: First, that it affords no real assistance to the Court's judgment in the premises, and, while honestly given, is nearly always addressed to the court in a spirit of complaisance to gratify the counsel who present it; and, secondly, because it seems to me to lower the standard of the bar to be so ready to engage in sizing up the claims of their brethren, substituting their own judgment upon hypotheses for that of the court of award upon facts which are, or ought to be, within its actual knowledge.

In answer to the court's intimation that the amount of this application equaled the salary of a judge of the superior court for three years and nine months, the usual response was made as to an underpaid judiciary. I question if there be any validity in this stock argument. It is curious to observe, however, that there are so many lawyers who seek and sometimes receive fabulous fees and yet are willing to surrender a lucrative practice for a slender salaried situation on the bench.

But this is aside. The question here is: What is this appointed attorney applicant entitled to for services rendered in this administration? The great item he lays stress upon is the matter of the proceedings upon the confirmation of the sale of the interest in the partnership to Mr. W. P. Fuller, Jr., March 11 and 12, 1891, and to which the greater part of

his statement of services is argumentatively devoted; but the accident which made him the central figure in the probate forum upon that occasion is not to be esteemed as of so costly a consideration as would appear from his recital; for it seems from the record that the court would have proceeded whether there was any attorney or not; indeed, it could not dutifully have paltered with the crisis, if it desired to do so; and so the court repeatedly said in the course of the discussion forced upon it.

Mr. Lyons has filed a supplemental statement of services rendered subsequent to the filing of the amended account of the executrix, and it betokens exquisite care and arduous labor, but I do not understand that he claims additional compensation therefor—in fact, I believe he expressly disclaimed any extra allowance for this work of supererogation.

Looking over the whole ground with an anxious desire to mete out justice to an attorney of approved ability and more than common industry, as well as peculiar proficiency in probate practice, I find it impossible to come to an agreement with him as to the measure of his compensation in this case. In the circumstances he could not have earned that amount. And that is the test: What did he earn?

“The attorney may receive a fee, to be fixed by the court, for his services,” to be charged to the party represented by the attorney: Code Civ. Proc., sec. 1718.

The fees paid by the junior W. P. Fuller to outside attorneys, without authority, and for services other and different, and upon a contingent basis, and totally disallowed by this court, afford no criterion for the charge made or allowance asked by the appointed attorney.

In the judgment of this court, an adequate allowance to him would be in the sum of \$4,750, and that amount is allowed and awarded in satisfaction of his services.

ESTATE OF ANNA E. LUESMANN, DECEASED.

[No. 12,770; decided October 10, 1892.]

Death may be Presumed Within a Period Less than Seven Years from the time of the last tidings or trace of an absentee, when the circumstances leave no other probable conclusion.

On September 21, 1892, H. H. Luesmann, the husband of Anna E. Luesmann, filed a petition for letters of administration upon her estate, wherein he averred that she died in San Francisco on or about June 24, 1890.

F. T. Duhring, for petitioner.

COFFEY, J. The testimony of the husband, the daughter, and of intimate friends of the family, established the facts:

Anna Elizabeth Luesmann, the wife of H. H. Luesmann, disappeared from her home, in this city and county, on the morning of June 24, 1890, and no trace of her has since been discovered, though every effort has been made to find her. A reward was offered through the newspapers for information that would lead to her discovery, and the police were notified and instituted a search, but without results; and great newspaper notoriety attended the disappearance of the lady.

Mrs. Luesmann was a woman of good habits and excellent character, and her married life was very happy. She had the full confidence of her friends, and the entire affection of her husband and little daughter and she had no cause for discontent with her condition which would have induced her to break the domestic and social ties with which she was so pleasantly bound to life.

There seemed to be but one cloud on her horizon, and that was the fact of the severe illness of her little daughter, Amalie, to whom she was entirely devoted, which illness has extended over a period of almost four months, and during which time she (the child) was often at the point of death. So slow was her recovery that the mother, wearied and worn in body and mind with the long watching over the bed of her loved one, despaired of her life, and her sorrow sat so heavily upon her that she gave up hope and said the child would die,

and if the child died she had no desire to survive. This was her oft-expressed and repeated assertion to her neighbors and friends. It was when this belief was most settled in her mind that she left her home forever, and, as her family and friends verily believe, sought to precede her beloved child to the land of the future by drowning herself in the waters of the bay.

At the time of her departure she was not dressed to travel, wearing an ordinary morning dress and slippers. Neither did she have her purse, the same, containing \$30, being found in the house afterward, as were also her bank-books, while the funds which they represent have never been called for. No tidings of any kind have been received from her, and not the faintest trace of her has been discovered.

These facts being proved, counsel contends that they are sufficient to entitle petitioner to letters of administration upon the estate of decedent.

As to the sufficiency of the evidence:

"The general belief of a family, that a missing member is dead, is admissible in evidence, as in many cases it is not only the best, but the only evidence which can be produced of his death": *Jackson v. Etz*, 5 Cow. 319; *Doe v. Griffin*, 15 East, 393; 1 *Greenleaf on Evidence*, 2d ed., pars. 201, 574.

"When one who is studious in habits, attentive to business, with a fixed and permanent residence and pleasant domestic relations, suddenly disappears, these facts may warrant a jury in finding the death at the time": *Hancock v. American Life Ins. Co.*, 62 Mo. 26.

"Death within a very recent time may be inferred from the circumstances of absence or disappearance. The presumption rests on the fact that it is strange that a man should absent himself without communicating with his friends. It is aided by whatever, in his situation, makes it more strange and impaired by whatever is easily credible": 2 *Rice on Evidence*, 1223.

"A jury may find the fact of the death of a party, from the lapse of a much shorter period than seven years unheard from, when the circumstances of the case raise the presumption of death. The age, state of health and habits of the absent party, and many other circumstances, may be shown

to aid or rebut the presumption of the continuance of life": *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

"There is no doctrine which in civil cases requires death to be proved by any more conclusive or peculiar evidence than any other fact material to recovery in an action. If the testimony satisfies the court or jury passing on the facts, and is reasonably sufficient and compels belief, the conclusion is certainly lawful": *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 42.

Tisdale v. Connecticut Mut. Life Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136, was an action on a policy of insurance upon the life of Edgar Tisdale, husband of plaintiff. There was evidence at the trial tending to prove that the party upon whose life the policy was issued was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition, which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, September 25, 1866, upon business, he was last seen by an acquaintance on the corner of Lake and Clark streets, in that city, about 3 o'clock P. M. of that day. No trace of him was afterward discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for information that would lead to his discovery, either dead or in life. The detective police were employed to search for him without results. No tidings have been received of him, and not the faintest trace of the cause or manner of his disappearance has been discovered. He gave no intimation to anyone of an intention to absent himself; and the latest declaration of intentions was to the effect that he expected to leave Chicago, the day of his disappearance, to join his wife at Dubuque. He owed no debts amounting to any considerable sum, and had made payment on some small ones about the day of his disappearance. His valise, containing clothing and other articles commonly carried by travelers,

was found at his hotel. His bill there was unpaid. Letters of administration, issued upon his estate December 18, 1866, were admitted in evidence.

In his opinion Beck, Judge, spoke as follows: "The questions for determination in this case relate to the correctness of the instructions given by the court to the jury. The first instruction announces the rule that the death of an absent person cannot be presumed except upon evidence of facts showing his exposure to danger, which probably resulted in death, before the expiration of seven years from the date of the last intelligence from him; and that evidence of long absence without communicating with his friends, of character and habits making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment which can be supposed to influence men to such acts, is not sufficient to raise a presumption of death. The instruction is not in accordance with the true rule of evidence, and is erroneous. The error is evidently the result of an improper construction of the familiar rule of evidence that, when a person has not been heard of for many years, the presumption of duration of life ceases at the end of seven years (2 Starkie on Evidence, 361), and an attempt to apply it to the facts in this case. The rule by no means limits the presumption of death to an absence of the person whose existence in life is in question without tidings from him for the space of seven years, nor does the modification of the rule laid down in the cases cited by counsel, that such absence for a shorter period, if the person is shown to have been in peril, will raise a presumption of death, exclude evidence of other facts and circumstances which tend to establish the probability of death."

It will be observed that the opinions quoted from above all go to show that death may be presumed within a period less than seven years from the time of the last tidings or trace of the absentee, when the circumstances and conditions of the absent one leave no other probable conclusion. Reference is omitted to the more frequent cases where the absentees were aboard of ships which were never heard from after leaving port.

The fact is important to note that in the Tisdale case letters of administration were granted in less than three months after the disappearance of Tisdale, while in the application at bar more than two and a quarter years have elapsed since the decedent was last seen. Particular attention is directed to this Tisdale case because of the many points of resemblance to the one at bar, and for that reason it has been more fully quoted than any other.

It is true that these opinions were given by tribunals other than those of California, but we have been unable to find any similar California case. There is only one case where the circumstances were similar to the one at bar where the opinion ran contrary to those quoted above, and that was the Succession of Vogel, 16 La. Ann. 139, 79 Am. Dec. 571; but after careful examination it is thought that the features of that case, as well as the law of Louisiana, are distinguishable from the case at bar.

Upon the evidence, and for the reasons hereinabove set forth, it is concluded that the petitioner is entitled to letters of administration.

Presumptions of Death arising from absence are discussed in the note to Estate of Kustel, ante, p. 4.

ESTATE OF THOMAS CRANE, DECEASED.

[No. 11,874; decided September 8, 1892.]

Wills—Taking Per Capita or by Representation.—Where a testator bequeathes one-half of the residue of his estate to the "heirs" of a deceased sister who left a surviving son and six children of a deceased daughter, these heirs take by right of representation and not per capita; that is, one-fourth of the residue goes to the son and one-twenty-fourth to each of the six children.

Wills—Lapse of Legacy on the Death of Legatee.—Where a testator bequeathes one-half of the residue of his estate to a sister, and she dies before his death leaving a daughter and three sons, and these sons also died before the testator, one of them leaving a widow and two sons and the other a widow, the bequest does not lapse, but goes to the lineal descendants of the sister. However, the widows of the deceased sons, not being lineal descendants, are not entitled to share in the bequest.

Elliott J. Moore and Edward C. Harrison, for Joseph H. Moore and Maurice C. Blake, executors.

Selden S. Wright, for the residuary legatees.

COFFEY, J. Thomas Crane died in the city and county of San Francisco on the thirteenth day of January, 1892. He was never married. His nearest relatives at the time of his death were the descendants of two deceased sisters, Mrs. Clarace Partridge and Mrs. Arelisle Seaman.

On the thirtieth day of July, 1885, he made his last will and testament. It bears that date. The will was duly admitted to probate in the superior court of the city and county of San Francisco, on the twenty-ninth day of January, 1892.

After making some pecuniary legacies, amounting in the aggregate to about \$15,000, he disposes of the residue of his estate as per the following clause, being the fifth clause of the will.

"Fifth.—I give and bequeath all the rest, residue and remainder of my estate, of whatever kind or nature, to my sister, Clarace Partridge, now residing in the city of St. Louis, in the State of Missouri, and to the heirs of my late sister, Arelisle Seaman, lately of Grand Rapids in the State of Michigan, to be divided, the one-half to my said sister, and the one-half to the said heirs; it is intended that all the above special bequests shall be first paid regardless of this residuary clause, and that after such payments that the residue be divided as in this last above named clause provided, regardless of said special bequests."

The construction to be given to this clause will fix the rights of the residuary distributees under the will. The residuum of the estate is divided into two equal parts. One of these parts is left to Mrs. Clarace Partridge, a sister, who was living at the date of the will, and who died prior to the testator, and the other part to the heirs of Mrs. Arelisle Seaman, the sister who had died prior to the date of the will.

1. As to that half of the residuum left to Mrs. Clarace Partridge: Mrs. Partridge died before the testator, on the twenty-ninth day of August, 1886, leaving at the time of her death, four children. Of these children of Mrs. Partridge, there was living at the date of testator's death only one, Mrs.

Clara Goldner. One of the sons of Mrs. Partridge, Henry Cotter, married and left a widow and two sons, to wit, Charles Cotter and Henry S. Cotter, and died before the testator; another son, John Cotter, married and left a widow but no child surviving, and died before the testator, to wit, on the twenty-second day of March, 1890. The other son, Edward, was never married and died before the testator, leaving no children.

Did the death of Mrs. Partridge, occurring, as it did, prior to the death of the testator, cause the provision in her favor to lapse?

This question is answered in the negative by the provisions of the Civil Code of California.

Section 1343, Civil Code: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section thirteen hundred and ten."

Section 1310, Civil Code: "When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee would have done had he survived the testator."

The will of the testator, Thomas Crane, took effect at and from the time of his death.

It is in favor of the lineal descendants left by his deceased sister, Mrs. Clarace Partridge, living at the time of his death, that the law makes provision for and saves the bequests from lapsing. Without these provisions the whole bequest of Mrs. Partridge would have failed. Under these provisions the rights of her lineal descendants alone are protected.

It follows that no person, not a lineal descendant of Mrs. Partridge, can claim any portion of this half of the residuum. This construction excludes the surviving widow of John Cotter, deceased, and upon the single ground that she is not a lineal descendant of Mrs. Clarace Partridge: Estate of Pfuelb, 48 Cal. 643.

It follows, then, that the one-half of the residuum devised to Mrs. Clarace Partridge will go to her daughter, Mrs. Clara

Goldner, and to Charles Cotter and Henry S. Cotter, children of her son Henry Cotter, deceased; and that they take by right of representation; that is, of the property bequeathed to Mrs. Partridge under this clause, Mrs. Goldner will take one-half (individually), and the children of Henry Cotter, deceased, will take in equal shares the other half.

2. As to that half of the residuum devised to the heirs of Mrs. Arelisle Seaman:

Mrs. Seaman died leaving one child, Wm. H. Seaman, and the descendants of one other child, Mrs. Arelisle C. Young.

These children of Mrs. Young are all living, and are Abram V. E. Young, Ellen (Nellie) Young, Thomas C. Young, William H. Young, Charles S. Young, and Arelisle M. Young.

The solution as to the distribution of this portion of the residuum depends upon the question whether the "heirs" of Mrs. Arelisle Seaman take by representation or per capita; that is, whether William H. Seaman takes one-quarter of the residuum and the children of Mrs. Young take the other one-quarter between them, or whether Mr. Seaman and the others (son and grandchildren) take equally, all being "heirs" of Mrs. Arelisle Seaman.

The question is an interesting one, and the numerous adjudications and nice distinctions which have been drawn in the adjudicated cases are many. I have extracted somewhat copiously but by no means exhaustively from many of the most recent decisions, as well as the most modern text-writers, and have appended such extracts, as interesting reading matter, to this opinion.

The scarcity of decisions in our own supreme court is to be regretted, but has resulted perhaps from the very plain provisions of the code of California, hereinafter quoted: Civ. Code, secs. 1334, 1335.

The statute of descent (called "Succession") in our Civil Code will be found also to have an important bearing in the determination. It will be noticed that under our laws of descent the distribution invariably takes place by representation and not per capita in every instance except in the two classes of cases mentioned, with others, in subdivisions 1, 6 and 7, in section 1386—in both of which classes alluded to the parties stand in the same degree of relationship.

Sections of the code bearing on the matter, and as showing to whom the property of a party dying intestate goes, are:

Civil Code of California, section 1386, subdivision 1: "If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife, and child or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation."

Section 1386, subdivision 7: "If the decedent leave several children, or one child, and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation."

Section 1386, subdivision 8: "If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation."

Section 1334, Civil Code: "A testamentary disposition to 'heirs,' 'relations,' 'nearest relations,' 'representatives,' 'legal representatives,' or 'personal representatives,' or 'family,' 'issue,' 'descendants,' 'nearest' or 'next of kin,' of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on 'Succession' in this code."

Section 1335, Civil Code: "The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated directly, and not as a qualification of an estate given to the ancestor of such person."

In the case under consideration Wm. H. Seaman is the only child of Mrs. Seaman, whose "heirs" are to receive this one-half of the residuum. The others are grandchildren and the parties stand of course in different degrees; and as the word "heirs" has received a legislative interpretation and signification under section 1334, Civil Code, above quoted, it follows that the division must be made by representation and not per capita, according to the provisions of the title on "Succession" in this code.

In other words, the devise being to the "heirs" of Mrs. Arelisle Seaman, deceased, they take in the same proportion as if they had inherited the estate from her. If they were all grandchildren they would take equally—per capita; as they are not, they take by representation.

The children of Mrs. Young take through her, and in equal parts among themselves, the one-quarter of the residuum, and Wm. H. Seaman takes the other one-quarter.

The weight of authority is certainly in favor of the same conclusion. (See the numerous cases quoted from and cited to that effect, appended hereto.)

But under section 1334, Civil Code, the matter is put to rest, not only as to this word "heirs," but the same rule is established when any of the other words designated in the statute are used in a will.

If the above views are sound, then, after payment of debts, expenses of administration and the money legacies, the re-

mainder of the estate will be distributed as follows: To Clara Goldner, one-fourth; to Charles Cotter and Henry S. Cotter, one-eighth each; to Wm. H. Seaman, one-fourth; to Abram V. E. Young, Ellen (Nellie) Young, Thomas C. Young, William H. Young, Charles S. Young and Arelisle M. Young, one twenty-fourth each.

APPENDIX.

In *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. 695, provisions in the will of a testator were that "I give and bequeath to Rachel Dillon, in addition to what she now had given to her during her natural life, lots . . . during her natural life; and, after her death, lots . . . to Sarah Mousseau, and the children of Lenora Pellertier (now deceased), her two children"; and, further: "I also give and bequeath to Sarah Mousseau, and the children of Lenora Pellertier, and James, Benjamin and David, children of Rachel, all the lands," etc. It appeared that Rachel was the wife of testator, and Sarah Mousseau, James, Benjamin, and David and Lenora Pellertier, were his children. Held, that it was intended to distribute the property by giving to the children of Lenora the share which the other children of testator named in the will would take under the devise; that is, they were to take per stirpes and not per capita, of the property designated.

Again, it is laid down as a cardinal rule of construction that, in the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it; which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect: See *Wright v. Hicks*, 12 Ga. 163, 56 Am. Dec. 451. And this rule is laid down in the case of *Ferrer v. Pyne*, 81 N. Y. 281; *Lyons v. Acker*, 33 Conn. 222; *Brenneman's Appeal*, 40 Pa. 115.

Eyer v. Beck, 70 Mich. 179, 38 N. W. 20: Under a clause in a will providing that testator's estate "be equally divided among his heirs, to wit, J. B., the children of C. B., Jr., etc.," naming his other children, the testator's grandchildren take per stirpes the share of their deceased parent, as if he had been also designated as a legatee, and not per capita.

In spite of the learning of some of the outside decisions to the contrary, we think there is significance in grouping without naming them. But, aside from this, we think that before the statutory policy is rejected some intention to reject it should appear.

In *re Swineburne et al.*, 16 R. I. 208, 14 Atl. 850: A will directed: "All the rest of my estate I give and bequeath to R., . . . the legal heirs of B., and of T., M. S., M. C., E., and C., and S., share and share alike, to them, their heirs and assigns, forever. Should either of my above-named children die, leaving no legal heirs born of their own body, then I give their shares, after their death, to my then living heirs." B. died before the testator's death. Held, that the words "of T." were used, by clerical mistake, instead of "to T.," the subsequent clause clearly importing that T. was not excepted from the provisions of the will.

The intention of the testator to have the two children of his deceased son, B., take per stirpes is manifested by his use of the words "legal heirs of B." in designating them; and this construction, being in harmony with the entire structure of the bequest, should take effect, notwithstanding the use of the expression "share and share alike."

Cummings' Exr. v. Cummings et al., 146 Mass. 501, 16 N. E. 401: A testator directed his executors "to keep safely invested all the rest and residue of my estate, after payment of the several legacies herein bequeathed, and of my just debts and funeral charges, and to pay the income thereof to my dear wife during her life, and at her decease to divide the principal thereof equally between my blood relatives of the degree which the law permits." Held, that the estate of the residuary legatees vested in those who were the testator's heirs at the time of his death, and that the distribution should be made per stirpes and not per capita.

Viewing the whole expression most favorably to those who seek a distribution per capita, it was merely equivalent to "equally among my heirs," and, where that is the language, the division is according to the statute of distribution. "A devise to heirs indicates not only the persons who take, but also the manner and proportion in which they take: *Rand v. Sanger*, 115 Mass. 124. See, also, *Balcom v. Haynes*, 14

Allen, 204; *Holbrook v. Harrington*, 16 Gray, 102; *Hall v. Hall*, 140 Mass. 267, 2 N. E. 700; *Booth v. Vicars*, 1 Colly Ch. 6; *Fielden v. Ashworth*, L. R. 20 Eq. 410; *In re Campbell's Trusts*, 33 Ch. D. 98.

"There is much in the situation of the testator in reference to the number of his heirs of different classes, and the effect which the opposite construction would have upon the distribution of his estate and in the manifestation of his intention toward different heirs in other parts of his will, to strengthen this view. We are therefore of opinion that the distribution among the legatees under this clause should be made per stirpes and not per capita."

Henry v. Thomas, 118 Ind. 23, 20 N. E. 519: A testatrix, by her will, gave her husband \$2,000, and then bequeathed the balance of her estate "to be divided equally among my brothers and my sisters, and the children of deceased brothers and sisters, and the brothers and sisters of Perry J. Brinegar, deceased (husband of testatrix), and the children of deceased brothers and sisters," etc. Held, that the distribution among the children of deceased brothers and sisters mentioned should be made per stirpes and not per capita.

"We think the proper construction to be given to this will, and the manifest intention of the testatrix, was to give to the children of each deceased brother and sister of herself and deceased husband the same share that their parent would have taken if living; the child or children of one deceased brother or sister to take the same share that one living brother or sister should take. In legal phraseology, they take per stirpes and not per capita. We are supported by the weight of authority in this construction. The case of *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457, was a devise almost identical with this. In that case the will made a devise as follows: 'I give and devise to my beloved wife the farm on which I now reside, as well as all my other real estate of which I may die legally possessed; also all the personal property of whatever description of which I may die the owner, to have and to hold during her natural life; and at her death it is my will that whatever remains of my estate, whether real or personal property, in the hands of my wife,

shall be equally divided among my children then living and the descendants of such as may be dead, share and share alike—taking into consideration all advancements which may have been made either by myself or my wife.' The court, in construing the will in that case, says: 'We deem it clear that the intention of the testator was to give his children and their descendants or heirs the same estate as the law would give them; that is, that the children living should share alike, and the children or descendants of the dead should take the share that would have fallen to the father or ancestor, had he been living. To put our conclusion in more technical terms, we decide that the beneficiaries of the testator's bounty take per stirpes and not per capita. The case of *Houghton v. Kendall*, 7 Allen, 72, and authorities there cited, support this construction': Cites *Raymond v. Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688.

Preston v. Brant, 96 Mo. 552, 10 S. W. 78: Testator devised lands to his wife for life, "and after her death unto the heirs of my daughter E., and the heirs of my son H. (*) which said heirs shall take (* * *) as purchasers from me, and not by inheritance of or descent from my said wife." Held, that the heirs of E. and H. took per stirpes and not per capita, especially as in other clauses similar devises were made to E. for life, and then to her heirs and to H. for life, and then to his heirs; thereby showing that the testator used the terms "heirs of E." and "heirs of H." respectively as referring to a class.

Woodward v. James, 115 N. Y. 346, 22 N. E. 150: Devise to "legal heirs, after death of testator's wife." By the term "legal heirs" the testator meant to designate those of his collateral kindred to whom the law would have given the property in case of intestacy, and the children of deceased brothers and sisters take per stirpes and not per capita.

"The conclusion to be reached on this will is not altogether clear and obvious, but I am inclined to agree with the general term that the testator meant by the phrase 'legal heirs' those who would take in case of intestacy and in the proportions prescribed by the statute; grounding such conclusion, not merely on the situation, but also upon the language of the will, since, as was said in *Ferrer v. Pyne*, 81 N. Y. 284, the

rule of per capita division will yield to a very faint glimpse of a different intention. It may be that we should follow the rule prevailing in many other states, that a devise to heirs, which compels a reference to a statute to ascertain who should take, makes the same statute the guide to the manner and proportion also: *Richards v. Miller*, 62 Ill. 417; *Bassett v. Granger*, 100 Mass. 348; *Baskin's Appeal*, 3 Pa. 304, 45 Am. Dec. 641; *Bailey v. Bailey*, 25 Mich. 185; *Cook v. Catlin*, 25 Conn. 387. But for the present purposes we hold that the will discloses an intent that the remaindermen should take as in a case of intestacy, and so per stirpes."

Mayer v. Hover, 81 Ga. 308, 7 S. E. 562: A will directed certain property to be divided between the children of H. and M. The latter filed a bill in behalf of himself and children, alleging that they were entitled to a portion of the property; that the executor had refused to turn it over; and prayed partition and a construction of the will. The executor admitted the facts alleged.

"The children of H. and M. take under the will per stirpes and not per capita.

"Nor do we think that this plaintiff is entitled to recover through his deceased sister. In our opinion that item of the will, construed by the court in 1864, did not intend to give this property to the children of Lemuel and Mary per capita, but they took under it per stirpes. Half went to the family of Lemuel and half to Mary. This being true, the present plaintiff has no right, title or interest in half of the property, which was distributed to the child or children of Lemuel, and the court was right in holding that he could not recover."

Appeal of Alston (Pa.), 11 Atl. 366: A clause in testator's will was as follows: "This is my will: that my brother, Robert Kingan, shall have and hold for his own special benefit all my property, real and personal, for and during his life; and at his (my brother Robert's) death the real estate to be divided among my legal heirs, share and share alike." Held, that testator's heirs would take per stirpes and not per capita.

"The foundation of the per stirpes rule of distribution rests in a large measure on the presumption that, when bene-

ficiaries are in equal degrees of relationship to the testator, his affection for each is equal, and therefore he will desire to benefit each equally: *Osborn's Appeal*, 31 Leg. J. 247. The expression 'share and share alike' is applicable as well to individuals as classes: *Id.* No case has been found in which, standing alone, it has been construed by the supreme court of this state to limit or modify the operation of the statute of distribution in respect to the proportions the next of kin should take; on the contrary, in *Baskin's Appeal*, 3 Pa. 304, 45 Am. Dec. 641, and in *Wood's Appeal*, 18 Pa. 478, distribution per stirpes was made, notwithstanding this and stronger expressions were used."

Lockwood's Appeal, 55 Conn. 157, 10 Atl. 517: The will provided that the estate should go to such children of the niece and to such children of the nephew as should be living at the testator's death, "to be equally divided between said children, to wit: of said J. and M., and to belong to them and their heirs forever." There was also a provision that, in the event of the death of any of such children, their issue, if any, should stand in their parent's place. At the testator's death both niece and nephew were dead, the niece leaving two children, one of whom had also died, with issue, and the nephew leaving one child. Held, that the surviving children took per stirpes and not per capita.

Campbell Exr. v. Clark, 64 N. H. 328, 10 Atl. 702: "A devise 'in equal shares to my nieces and nephews and to the nieces and nephews of my former husband' is a gift to such of them as survive the testatrix, and they take per capita."

Schouler on Wills, page 545, section 538: "Taking Per Capita or Per Stirpes.—That distinction, so familiar in the distribution of the estates of decedents—namely, between per capita and per stirpes—comes now into view. Where all the persons entitled to share stand in the same degree of kin to the decedent, as, for instance, all grandchildren, and claim directly from him in their own right, and not through some intermediate relation, they take per capita; that is, in equal shares, or share and share alike. But where they are of different degrees of kindred, as in the case of grandchildren and great-grandchildren, the latter representing some deceased grandchild like A, they take per stirpes, or according to the stock they

represent; and hence the great grandchild of A may take his dead parent's share, while other great-grandchildren are excluded because their parent B, C, or D is living. When persons take as individuals, they are said to take per capita; when by right of representation, per stirpes.

"If this distinction is embodied in the laws which distribute an intestate estate, a testator may expressly contemplate it in his will or the law presume it for him in his silence. One may thus exclude the legal inference of representation by naming the grandchild of a deceased child with children, or specified individuals as all to take 'share and share alike,' or by some similar expression; or he may, on the other hand, give representation its natural force silently or by saying that such grandchild shall 'take his parents' share,' 'take by right of representation,' and the like. The statute policy of the jurisdiction must determine how far the rule per stirpes should be carried, when the assent of the testator is to be inferred from the language or the silence of his will.

"In general, legatees will take per capita rather than per stirpes, or vice versa, where it is clearly apparent what the testator intended.

"Section 539.—Personal representatives or the next of kin, under the Statutes of Distributions, take naturally per capita by the policy of the English law. Hence, an express provision that the 'personal representatives' of a child, or children, shall take per stirpes and not per capita has been taken to indicate that the testator used 'personal representatives' in the sense of 'descendants.' Heirs, on the other hand, or bodily heirs, 'heirs and assigns,' and such like expressions, signify prima facie that the gift was to take effect per stirpes.

"But all such construction gives way if another intent be detected; and detached words afford no constant test of what the testator really intended. As where one gives 'equally' or 'share and share alike' to his lawful 'heirs'; though once more 'equally,' or 'share and share alike,' might fitly refer in a given case to a division among a class as per stirpes.

"On the other hand, where the gift is to those who would take in case of intestacy, or to 'next of kin' in classes, leaving it doubtful what should be their due proportions, it is

held in the United States the safer rule to construe 'next of kin' in close conformity with the Statute of Distributions, so as to give representation and the division per stirpes its usual effect under the local policy. These presumptions do not seem to vary in force whether the heirs, next of kin, etc., referred to are those of the testator himself or of some other person living at the date of the will.

"Section 540.—As for a gift to be shared by the children of two or more persons, whether expressed to the children of A and B, etc., or to the children of A and the children of B, the devise or bequest means *prima facie* that these children shall take per capita and not per stirpes. And thus it is also with a devise or bequest to children and grandchildren or to brothers and sisters and nephews and nieces, as though intended to be equally divided among them, the objects of bounty being specified by name. Indeed, wherever as a class the beneficiaries are individually named, or are designated by their relationship to some ancestor living at the date of a will, whether to the testator or some one else, they share per capita by natural inference, and not per stirpes; and especially if they are all of the same degree. Persons, moreover, who would otherwise have taken per stirpes, as A and the children of B, or the members of a specified class and their children, may, from the collective description under which all are embraced in the will, be presumed to take per capita and equally. But this construction bends readily as in other cases to indications in the will of a contrary purpose, if such be the fairer conclusion from the whole context. And the instances where the presumption has thus given way are very many.

"As in the mode of appropriating income, or a failing share before the capital fund is to be distributed; or by force of such words as 'heirs' or 'respectively.'

"Section 542, page 551.—The word 'heirs' in a bequest of personal property, referring to the heirs of A, means, then, *prima facie* the persons who would be entitled to that property had A died intestate; and this whether A is the testator himself, or some one else named in the will, and whether the gift is substitutional (as in the bequest to 'A' or his heirs) or original (as to 'the heirs of A'). In other words, 'heirs'

is not 'next of kin,' according to the civil computation, but the statutory next of kin, or distributees, those who, for the purpose of succession, stand in a position analogous to that occupied by heirs, as to real estate, under the law of descent."

Dole v. Keyes, 143 Mass. 237, 9 N. E. 625: A devise of the income and improvement of real and personal estate "to my children A and B, and at their decease the said real and personal estate shall revert to their children—and also the above-described estate given to my beloved wife, after her decease, to them and their heirs forever"—gives a vested remainder to the children of A and B per capita, and not per stirpes.

In *Merriam v. Simonds*, 121 Mass. 198, 203, there was an indication that the remaindermen would have taken in a representative capacity if the gift to the first takers had been absolute; for the remainder was "to their children or legal representatives," and the decision went on the ground that legal representatives were mentioned.

Wells v. Hutton et al., 77 Mich. 129, 43 N. W. 768: Under a will devising decedent's estate to her son, to four children of her deceased daughter, and to one son of another deceased daughter, to be divided as follows: "One-third to my son . . . and two-thirds to the said children of my said deceased daughters," followed by a clause bequeathing five dollars to another granddaughter, these being the only living children and grandchildren, the last-mentioned granddaughter is entitled to five dollars, the decedent's son to one-third of the estate left, and the remaining two-thirds should be divided among the rest per capita.

"These two legatees' shares disposed of, there is nothing remaining indicating in any way that the testatrix intended the balance of her property to go to the legatees except per capita. The persons are all named to whom she intended the legacies to go, and no circumstance has occurred since she made the will which could have possibly changed the evidences of her intention, or that would suggest any other disposition could have been contemplated by the testatrix."

Balcom v. Haynes, 96 Mass. (14 Allen), 204: A testator, by one clause of his will, gave a pecuniary legacy "to the

heirs of my sister F." By another clause he gave the residue of his estate "to my brothers A, B and C, and my sisters D and E, and the heirs of F, to be divided in equal shares between them." Held, that the heirs of F were entitled collectively to one-sixth of the residue.

Bill in equity by the administrator de bonis non, with the will annexed, of the estate of Asahel Haynes, seeking instructions as to the proper mode of distributing the estate. The only material clauses of the will were the third and sixth, which were as follows:

"Thirdly. I give and bequeath to the heirs of my sister, Lydia Walkup, seven hundred dollars.

"Sixthly. I give and devise to my brothers John W. Haynes, Amos Haynes and Charles Haynes, and my sisters Susan Boyd, wife of Stephen Boyd, Ruth Boyd, wife of Warren Boyd, and the heirs of Lydia Walkup, and their heirs respectively, all the rest and residue of my real and personal estate, . . . to be divided in equal shares between them."

There were five heirs of Lydia Walkup, and they each claimed one-tenth of the residue; but the other residuary devisees claimed one-sixth each.

Said Gray, J.: "It is well established, as a general rule of the construction of wills, that by a gift either to the children of several persons, or to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, the objects of the gift take per capita and not per stirpes; and therefore in the latter case each child of the second person takes a share equal to the share of the first person. But this, like some other general rules for the construction of wills, has perhaps been adopted and adhered to by the courts rather from the importance of having some rule of interpreting phrases so frequently used by testators, than from any strong and preponderating reason in its favor. And the authorities fully support the statement of Mr. Jarman that 'this mode of construction will yield to a very faint glimpse of a different intention in the context': 2 Jarman on Wills, 4th Am. ed. 111, 112 and notes, The will of Asahel Haynes, however, does not in the clause in question by which he gives the residue of his estate to three of his brothers, two of his sisters, 'and the heirs of Lydia

Walkup' (who was a deceased sister), use the words 'children' but 'heirs,' and the difference is material. The word 'children' is ordinarily used as a word of description, limited to persons standing in the same relation, and has the same effect as if all their names had been given: 2 Jarman on Wills, 69. But the word heirs, 'in the absence of controlling or explanatory words, includes more remote descendants, and is to be applied per stirpes': Daggett v. Slack, 8 Met. 450; Tillinghast v. Cook, 9 Met. 143.

"The addition of the words 'to be equally divided between them' might indeed have the effect of giving it to them per capita if those words necessarily applied to the heirs inter sese. But such is not this case; for, according to the construction of either of the contending parties, the residue is to be divided in equal shares, and the only question is among whom it is to be divided; and the words 'to be equally divided between them' may be satisfied by being applied to the division between the classes, and not to that between the individuals: Holbrook v. Harrington, 16 Gray, 102. . . . Risk's Appeal, 52 Pa. 269, 91 Am. Dec. 156.

"We are not left to decide this case upon the words of the sixth clause only; for in the third clause of the will is another gift, 'to the heirs of my sister, Lydia Walkup,' which clearly treats them as a class; and the reasonable construction is to interpret similar words in the same manner in the residuary clause.

"We are therefore of opinion that the children of Lydia Walkup took as a class one-sixth only of the residue of the testator's property."

Estate of Pfuelb, 48 Cal. 643: "'When an estate shall be devised to any child or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done if he would have survived the testator': Stats. 1850, p. 179. The question for determination is, whether the stepson was a 'relation' of the testatrix in the sense of this section.

"It will be observed that the provision of the statute is confined to a devise to 'any child or other relation of the testator.' Does the term 'relation,' as here used, include relations by

affinity as well as by blood? In its widest popular sense it might possibly include both; but the courts have been frequently called upon to construe it in the interpretation of wills, and it has been uniformly held to include, in its legal sense, only relations by consanguinity: 2 Kent's Commentaries, 537, note; 2 Jarman on Wills, 45; 2 Redfield on Wills, 425; *Storer v. Whitney*, 1 Pa. 506.

"In *Esty v. Clarke*, 101 Mass. 36, 3 Am. Rep. 320, the court was called upon to construe a statute strictly analogous to ours; and it was there held that the wife is not a relation of the husband within the meaning of the statute, and that her son by a former marriage will not, by virtue of the statute, take a bequest to her by her husband. It is unnecessary for us to go so far in this case; but if the son by a former marriage of a deceased husband of the testatrix is a 'relation' within the sense of the statute, then a cousin in the third or fourth, or any remote degree of the husband, would come within the same category. In providing that a devise to a 'relation' of the testator should not lapse by the death of the devisee during the lifetime of the testator, if the devisee left lineal descendants, it was not intended to include persons in nowise related to the testator, except through affinity."

The Word "Relative" or "Relation," as employed in statutes which save in certain cases legacies from lapsing on the death of the legatee, has been construed to include only relatives by blood, and to exclude a stepson and also a wife: *Estate of Pfuelb*, 48 Cal. 643; *Estate of Renton*, 10 Wash. 533, 39 Pac. 145.

ESTATE OF ANNA J. SKERRETT, DECEASED.

[No. 5695; decided December 11, 1888.]

Equitable Conversion—Conflict of Laws.—Where a person residing in England bequeathes real estate situated in California to the Catholic Archbishop of London, "to be distributed by him at his discretion among such poor people as he may select," the intention of the testator is that the real property should be treated as personalty and its proceeds distributed by the archbishop.

Foreign Wills—Distribution of Estate.—Code of Civil Procedure, sections 1322 and 1667, are, upon an application under the latter section, to be read together, and when so read, the reference in section 1667 to another "state" includes a foreign country.

Distribution—Delivery to Foreign Administrator.—Upon an application, under section 1667, Code of Civil Procedure, for an order for delivery to a foreign administrator with the will annexed of an estate in this state which is treated as personalty, the validity of the will is to be determined by the courts of the domicile of the testatrix, and according to the laws of such domicile, and not by the courts or according to the laws of this state.

Anna J. Skerrett died in London, England, and at the time of her death was a resident thereof. She left a will executed in London. By this will she devised and bequeathed all her estate "to the Very Reverend, the Roman Catholic Archbishop of Westminster, for the time being, to be distributed by him at his discretion among such poor people as he may select," subject to two legacies of 100£ each, and an annuity of 18£ and 4s. to a servant of the testatrix.

No executor was named in the will, and letters of administration, with the will annexed, were granted, in England, "to the Most Reverend Henry Edward, Cardinal Manning, Archbishop of the Roman Catholic Diocese of Westminster, and as such the residuary legatee in trust."

The testatrix left a parcel of real property in San Francisco, and James C. Pennie, the public administrator therein, was appointed administrator with the will annexed of the estate in California. The real property belonging to the estate was sold in course of administration. After the time for the presentation of claims had expired, the local administrator filed his final account, together with a petition showing that the estate here was in a condition to be closed, but that it was indebted in foreign countries to various persons whose claims had been presented to the foreign administrator and had not been paid for want of funds.

Petitioner prayed that he be directed to deliver the estate to the foreign administrator pursuant to section 1667 of the Code of Civil Procedure.

The estate remaining at the time of this application consisted of the balance of the rents received from the real property belonging to the estate and of the proceeds of the sale thereof.

The heirs of the testatrix contested the petition of the administrator and prayed for distribution to themselves.

Counsel for the foreign administrator contended that it was the purpose of the testatrix that the realty should be converted into personal property, and that the estate in California should be treated as personalty, and that, under section 946 of the Civil Code, "if there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."

Counsel for the heirs contended that section 1313 of the Civil Code is a law "to the contrary," and that, under that section, not more than one-third of the estate could be bequeathed in trust for charitable uses; that the estate could not be considered as personalty, there having been no express direction in the will to convert the real property into money, in which case only the proceeds would, under section 1338 of the Civil Code, be deemed personal property from the time of the death of the testatrix, and that, under section 1376 of the Civil Code, the validity and interpretation of the will (although such will was executed out of this state) are governed by the law of this state as to property, both real and personal, within the state.

The opinion which follows was delivered orally, upon the conclusion of the argument, and was subsequently confirmed by the court.

Joseph Naphtaly, for James C. Pennie, administrator.

A. H. Loughborough, for Cardinal Manning, the foreign administrator.

John F. Burris and Joseph Hutchinson, appearing separately for various heirs.

John M. Burnett, for absent heirs.

COFFEY, J. I am inclined to think that this matter really hinges on the question whether this property shall be treated as real property. I do not think that one part of Mr. Burnett's argument is sound; it is specious, but unsound. The intention of the testator—gathered from the terms of the instrument, the will—is to distribute the proceeds. What was meant to leave to the discretion of the Cardinal is the distribution of the money, because it could not reasonably be

imputed to her that she meant that he was to distribute the real estate; and, if there is anything to be gathered from that instrument, it is that in his discretion he was to distribute the proceeds among the poor—that is what I should say would be a reasonable construction of the language of the will, taking it according to the rules of construction laid down in the statutes, the surroundings and so on, and I have only to repeat now, what I said the other day, so far as construing this will is concerned, it is a question whether it is for this court to make the construction, or the court of principal jurisdiction. The court of principal jurisdiction would deal with the rights of the creditors and other parties within the jurisdiction of that court, rather than according to the laws of this state. When the section 1667 speaks of another state, it refers—by reference to section 1322—to any foreign state, because the language of 1322 is “any foreign country or state,” and then 1667—it says, any other “state.” It does not say any other foreign state—it is not necessary, because, as we all know, every other state is foreign to the state of California, no matter whether any of the other states would be one of the United States, or any English state, or any other country across the water. If this is to be tried according to the doctrine of equitable conversion, then it comes within the purview of the decision in the Estate of Apple, 66 Cal. 432, 6 Pac. 7, which remits the whole question to the domiciliary jurisdiction—in this instance being England, as in that instance it was Nevada; and as to this jurisdiction, both of them are equally foreign states. Now, Mr. Burris’ argument has made sufficient impression upon my mind to cause me to examine this question further, and to see if this court is competent to try the provisions of this will with reference to the validity of the bequest or the invalidity of the bequest as argued in this case. I will take the matter under advisement, and look into it a little further, and as soon as possible render a decision. My present impression is—if I adhere to that—I will say that the assets should be remitted to the other jurisdiction.

After the court had further considered the matter, the original impression was confirmed and the petition was granted.

Equitable Conversion is that change in property by which, for certain purposes, real estate is considered as personal, and personal as real. Whether such a result is worked by a will depends upon the intention of the testator. If it is apparent from the express terms of the instrument, or by necessary implication, that he intended his real estate to be sold and the proceeds given his beneficiaries, an equitable conversion results, although perhaps the direction to sell is not imperative, as where the word "desire," instead of "direct," is addressed to the executors: *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413; *Haward v. Peavey*, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503.

When a testator creates a trust of all his property, real and personal, some of the realty being in different states, with a direction to his executor to sell it all and invest the proceeds in land in a specified city, the property mentioned in the will is considered, in equity, as real property situated in the city designated: *Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315. And if a will works a conversion of real property into personalty, a trust in respect thereto is a trust of personal property, the validity of which is determinable, not by the law of the situs of the realty, but by the law of the place where the testator was domiciled at the time of his death: *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413.

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ADMINISTRATION OF ESTATE IN GENERAL.

Administration.—Under the Mexican Jurisprudence there are no administrations with respect to the successions of decedents.—Estate of Blythe, 152.

Administration—Duty to Close Speedily.—It is the duty of the court and executor to close an administration speedily, and as soon as the debts and expenses of administration are paid and there are persons entitled to the possession of the estate.—Estate of Tessier, 362.

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ANNUITIES.

Annuities—Failure of the Fund.—Where annuities are payable from the rents of a building, and the building is sold during the course of administration, the rights of the annuitants are measured by the rule that when the funds out of which annuities are payable fail, resort may be had to the general assets as in the case of a general legacy.—Estate of Hale, 191.

APPEAL AND ERROR.

Appeal—Affirmance Without Opinion.—The affirmance of a judgment by an appellate court, although without an opinion, is a determination that the objections argued against it are unavailing.—Estate of Sutro, 120.

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See Compensation of Administrators.

APPAISERS OF ESTATE.**1. Appointment and Duties—Appraisement of Property.**

Appraisers.—The Court or Judge must Appoint three disinterested persons to appraise the estate of a decedent, and the three appointees must discharge the duty imposed upon them unless they renounce the trust.—Estate of McLaughlin, 107.

Appraisers.—The Provision of the Statute that "Any Two" of the appraisers "may act" only means that the valid action by two of the appraisers, where the third appointee refused to, or for some reason not imputable to the acting two did not act, would be a sufficient execution of the powers invested in and the duties imposed upon the three; and is intended to prevent a failure or invalidation of the whole appointment.—Estate of McLaughlin, 107.

Appraisers—Performance of Duties.—Appraisers are Officers of the court, and, in the execution of their appointment, bound to the performance of a judicial duty, in which the creditors and heirs of the deceased, and the court, are interested and concerned. Whether or not one of the appraisers shall perform his judicial duty cannot depend upon the whim or willfulness of the executor or administrator, or the two other appraisers.—Estate of McLaughlin, 107.

Appraisement—Validity When Made by Two Appraisers.—The legal status of an inventory and appraisement which is merely the act of

two appraisers, without an opportunity given to the third appraiser to act and a failure on his part to do so, is that it is invalid, and an imposition and fraud upon the court. Therefore, in the case of appraisements returned by two appraisers only, a statement should be annexed to and form part of their report, showing the reason for the nonaction of the third appointee.—Estate of McLaughlin, 107.

Appraisers.—Persons in the Employment of the Executrix should not be appointed appraisers.—Estate of McLaughlin, 107.

Appraisers.—The Court Should Designate the appraisers of estates of decedents, rather than to accept nominations made by the executor.—Estate of McLaughlin, 107.

Appraisers.—The Extent of an Appraiser's Duty was called in question where it appeared "he might have received memoranda as appraiser, or had access to, or knowledge of such, showing a statement of property differing from that returned in the official inventory," and it was suggested that our statute, although vague, seems to convey the idea that the inventory of a decedent's estate is not necessarily made up by the executor or administrator alone, but more properly in conjunction with the appraisers.—Estate of McLaughlin, 107.

Appraisement—Description of Property.—The appraisers, as well as the executor or administrator, must "give a full description" in the inventory and appraisement of every item of property belonging to and character of claim and interest in the right of decedent, and whether it be community or separate property; and "make diligent inquiry" in that regard.—Estate of McLaughlin, 107.

Appraisement.—The Requirements of the Appraisers' Duties as to the Inventory and appraisement, and return thereof, set forth in detail.—Estate of McLaughlin, 107.

2. Compensation of Appraisers.

Appraisers.—The Compensation of Appraisers is regulated and fixed by statute; the maximum allowance is \$5 to each appraiser for every day's service by him, and evidence of a quantum meruit in excess of that amount is inadmissible.—Estate of McLaughlin, 107.

An Appraiser's Right to Compensation is Confined to the Days actually and necessarily employed in the appraisement; constructive services or charges will not be recognized. An itemized account of each day (by specific date) employed, and the particular services thereon rendered, must be made and returned as a part of the appraiser's report; and if compensation is waived, that fact must be noted.—Estate of McLaughlin, 107.

Appraisers—Gratuitous Service.—In the Appointment of Appraisers, where the circumstances merit gratuitous service, the court will appoint persons to act without charge; and the court's discretion to make such appointment may be invoked in all proper cases.—Estate of McLaughlin, 107.

See Inventory.

ASSETS OF ESTATE.

See Executors and Administrators, 4, 5; Inventory.

ATTORNEYS.**1. For Minor or Absent Heirs.**

Minor and Absent Heirs—Appointment of Attorney by the Court.—The court is authorized, in its discretion, under Code of Civil Procedure, section 1718, to appoint a competent attorney to represent minor heirs having no general guardian in the county; heirs and creditors who are nonresidents of the state, and other interested parties who are unrepresented. The exercise of this power imports no censure upon the counsel for the administrator; it is assistive and not obstructive.—Estate of Blythe, 337.

Minor Heirs—Appointment of Attorney.—The court will not exercise the power conferred upon it by section 1718 of the Code of Civil Procedure to appoint an attorney to represent minor heirs, except in cases where it is manifestly necessary; and in no case upon the suggestion of an executor or administrator, or other person in possible adverse interest to the parties sought to be represented.—Estate of Fuller, 521.

Minor Heirs—Duty of Their Attorney.—It is the duty of an attorney appointed by the court for minor heirs to call to the court's attention the failure on the part of an executor to comply with any requirement of the statute, and it is not for him to construe or interpret apparently imperative clauses of the statute as merely directory. Estate of Fuller, 521.

2. Compensation of Attorneys.

See Costs and Counsel Fees.

Minor and Absent Heirs—Compensation of Attorney.—There is no absolute standard by which to fix the compensation of an attorney appointed by the court to represent minor or absent heirs. A small estate may entail greater labor and relatively larger responsibility than an estate of magnitude. The size of the estate is a factor but not the prime one in the question. Each case must therefore depend upon its own circumstances.—Estate of Blythe, 337.

Minor Heirs—Duty and Compensation of Attorney.—There is a wide difference between the attorney employed for an estate and an attorney appointed by the court to represent minor heirs, and their compensation is not to be measured alike.—Estate of Fuller, 521.

Minor Heirs—Duty and Compensation of Attorney.—The attorney for an executor is employed and is allowed compensation to manage the legal affairs of the estate, and is accountable for the proper performance of his duties as such attorney; he prepares all the papers and appears as the principal representative in the court; while an attorney appointed by the court to represent absent or minor heirs is

an auxiliary of the court, and his service is in a sense subordinate. He acts as scrutinizer of the affairs of administration, a challenger and critic of the management of the estate, and is expected to advise the court from time to time as to any default or dereliction on the part of the administrator or executor.—Estate of Fuller, 521.

Minor Heirs—Compensation of Attorney.—The compensation awarded an attorney appointed by the court to represent minor heirs should be charged against the persons whom he represents and not against the body of the estate, even though the executrix assents to the charge; and such compensation should be in proportion to the interest represented, although the estate as a whole may incidentally benefit by the service.—Estate of Fuller, 521.

Attorney Fees.—Opinions of Attorneys as to the Reasonableness of demands for compensation for legal services afford no real assistance to the court's judgment.—Estate of Fuller, 521.

BASTARDS.

See Illegitimates.

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See Will Contests.

BURIAL EXPENSES.

See Funeral Expenses.

CHARITIES.

1. Charitable Bequests Generally.

Charities—One-third of Estate—Conflict of Laws.—Where a testator leaves real and personal property in California and real property in other states, and devises one-third of his estate to charities, the courts in this state cannot take into account the property situated beyond their jurisdiction in determining what one-third of the estate is.—Estate of Jones, 178.

Charities—One-third of Estate—How Determined.—The word "estate," as employed in section 1313 of the Civil Code, means estate in California. The one-third of the estate which may be given to charity is one-third of the distributable assets of the estate.—Estate of Jones, 178.

Charities.—The Excess of an Estate All Over and Above the One-third to charities goes to the residuary legatee or devisee, preferably to the next of kin or heirs at law, according to the provisions of section 1313 of the Civil Code.—Estate of Jones, 178.

Residuary Clauses—Charities.—In this Case it is Held that the Residuary legatees under a former will take the residuum of the estate, which is bequeathed to charities by the residuary clause of a latter will, but which they are unable to take by virtue of the restrictions imposed by section 1313 of the Civil Code.—Estate of Jones, 178.

2. Charitable Trusts.

Charitable Trusts—Parties in Suit to Quiet Title.—In a suit to quiet title, which involves the validity of a charitable trust created by will, the court held that, in the circumstances of the case, the primary trustees sufficiently represented the beneficiaries, and that neither the attorney general nor the ultimate trustees in being were necessary parties defendant.—Estate of Sutro, 120.

Charitable Trusts—Invalid Accumulations.—Section 723 of the Civil Code, which provides that "all directions for the accumulation of the income of property, except such as are allowed by this title, are void," applies to accumulations for charities.—Estate of Sutro, 120.

Charitable Trusts—General Charitable Intent.—The testamentary trust involved in this case is found by the court not to evince a "general charitable intent" which will be given effect so far as is consistent with the rules of law, if the mode prescribed is unlawful.—Estate of Sutro, 120.

Charitable Trusts—Purposes "Charitable or Other."—A testamentary trust which contemplates purposes "charitable or other" cannot be sustained as a charitable trust.—Estate of Sutro, 120.

Charitable Trusts—Noncharitable Purposes.—If some of the purposes of a testamentary trust are charitable, while some are not, no part of it is sustainable as a charitable trust, if the bequest violates the law regulating the validity of private trusts.—Estate of Sutro, 120.

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CLAIMS AGAINST DECEDENT.

Reference of Claim—Manner of Conducting.—Where an executor or administrator doubts the correctness of a claim presented to him, and a reference is had pursuant to section 1507, Code of Civil Procedure, the reference must be conducted as provided in section 1508 and sections 638-645, Code of Civil Procedure.—Estate of Burns, 39.

Reference of Claim—Testimony Against Executor.—The reference of a doubtful claim is "a proceeding prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person," and subdivision 3, section 1880, Code of Civil Pro-

cedure, applies, so that the claimant prosecuting cannot testify "as to any matter of fact occurring before the death of such deceased person."—Estate of Burns, 39.

Reference of Claim—Objection to Evidence.—Assuming that section 1880, Code of Civil Procedure, applies to the case of a referred claim against a decedent's estate, yet unless the objection to the claimant's evidence is taken before the referee, it cannot be urged afterward.—Estate of Wheeler, 32.

Reference of Claim—Sufficiency of Evidence.—Where a claim presented against a decedent's estate is, by stipulation of the executor and claimant, referred to a designated person "to ascertain its accuracy and report the same," and, upon the reference, the referee is notified by the executor that he has no testimony to offer and does not desire to be present at the examination, and the claim is fully substantiated by the oral testimony of the claimant, and bills and memoranda, and witnesses in corroboration of his evidence, an objection to the referee's report on the ground that the claimant's evidence was inadmissible under section 1880, Code of Civil Procedure cannot be sustained.—Estate of Wheeler, 32.

CLINICAL CHART.

See Wills, 1.

COLLATERAL INHERITANCE TAX.

See Inheritance Tax.

COLLECTION OF ASSETS.

See Executors and Administrators.

COMMISSIONERS.

See Compensation of Administrator.

COMMUNITY PROPERTY.

Community Property.—The Declaration of a Testator in His Will that the property devised is his separate estate cannot be considered as evidence that it is such.—Estate of Hale, 191.

Community Property—Products of Foreign Real Estate.—Where a married man picks orchilla in Mexico from land owned by himself and his copartners and ships the product to market in England, and the returns are remitted to him at a point over one thousand miles from the place of production, these products together with real estate purchased with their proceeds in California are community property. Estate of Hale, 191.

Community Property—Profits of Foreign Land.—The rule that property purchased with the rents and profits of land which is the separate

estate of the husband becomes likewise his separate property is restricted to cases where the purchase money is the proceeds of land used in the ordinary manner, and does not extend to cases where the products are shipped to a distant country and used in a business venture.—Estate of Hale, 191.

Community Property—Conflict of Laws.—The rents and profits of Mexican land held by a resident of California are subject to the laws of Mexico, and by those laws they are community property.—Estate of Hale, 191.

Community Property—Conflict of Laws.—Lands Purchased in a community property state with funds derived from real property acquired in a common-law state become the separate property of the husband, even if the funds were acquired in the other state under circumstances which would have made the land from which it was derived community property.—Estate of Hale, 191.

Community Property.—Money Borrowed by a Married Man and not secured by his separate property is community property.—Estate of Hale, 191.

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COMPENSATION OF ADMINISTRATORS.

Executors.—Commissions of Executors and Administrators cannot be Apportioned until the close of administration, and an executor must close his account as executor before being charged as trustee.—Estate of Tessier, 362.

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CONFLICT OF LAWS.

Real Estate—Conflict of Laws.—Real estate in Lower California is subject to the Mexican laws, even if it belongs to foreigners.—Estate of Hale, 191.

See Charities, 1; Community Property; Conversion; Executors and Administrators, 5; Marriage, 2; Probate of Wills, 2; Succession.

CONSPIRACY.

See Contest of Wills.

CONSTRUCTION OF WILLS.

See Wills, 7-10.

CONTEST OF WILLS.

Will Contest.—A Contest of Probate of a Will Partakes of the Nature of a civil action; its issues and results being determined and applied in like manner.—Estate of Tiffany, 36.

Will Contest.—The Rule that a Complaint must State the Cause of action in ordinary and concise language applies to the written grounds of opposition to the probate of a will. The facts should be stated concisely and with certainty, apart from all hypotheses, arguments and conclusions of law; and when once made the statement should not be repeated.—Estate of Goodspeed, 146.

Will Contest—Charging Conspiracy.—Where one is charged in a pleading with conspiracy with other persons, he has a right to have the names of the alleged conspirators made known to him.—Estate of Goodspeed, 146.

Will Contest—Misjoinder of Causes of Action.—Charges of fraud and duress constitute different causes of action, and should be stated separately.—Estate of Goodspeed, 146.

Will—Contest on Ground of Forgery.—The probate of a will is permitted to stand in this case as against a charge that the instrument is a forgery, the charge being based on the theory, which finds some support in the evidence, that the testator was not at the place where the will was executed at the time of its execution.—Estate of O'Brien, 168.

Will Contest.—Upon a Review of the Evidence, it was held in this case that the document offered for probate was executed by the decedent as and for his last will; that it was executed and attested in accordance with the law of this state, and that the testator was, at the time of such execution, of sound mind and competent in every respect to dispose of his estate by will.—Estate of Kershow, 213.

Will Contest.—The Burden of Proof in a Will Contest is on the contestant, and he should establish by a preponderance of evidence the issues which he tenders.—Estate of Kershow, 213.

Will Contest.—The Judgment of a Court of Another State admitting to probate as the last will of a decedent a document earlier in date than the one in contest is admissible in evidence under the general issue raised by an allegation that the document propounded as the last will of the decedent is not his will and a denial of this allegation.—Estate of Kershow, 213.

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CONTRACTS.

Contracts.—Particular Clauses of a Contract are Subordinate to Its General Intent, and the whole of a contract should be taken together so as to give effect to every part if reasonably practicable, each clause aiding in the interpretation of the other.—Estate of Levinson, 325.

CONVERSION.

Equitable Conversion—Conflict of Laws.—Where a person residing in England bequeathes real estate situated in California to the Catholic Archbishop of London, "to be distributed by him at his discretion among such poor people as he may select," the intention of the testator is that the real property should be treated as personalty and its proceeds distributed by the archbishop.—Estate of Skerrett, 552.

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COSTS AND COUNSEL FEES.

Will Contest—Allowance for Expenses.—There is a Distinction Between a Successful and an unsuccessful contest of a probate of will, as to the proponent's right to expenses incurred. Where a purported will has been refused probate, and so declared invalid, no rights or duties thereunder can be pretended.—Estate of Tiffany, 36.

Will Contest—Allowance for Expenses.—There is no warrant in the statute for an allowance of expenses incurred by the proponent of a purported will which has been refused probate, and jurisdiction in such matters cannot be sought for outside the code.—Estate of Tiffany, 36.

Will Contest—Costs and Counsel Fees.—Section 1332, Code of Civil Procedure, as to costs of a probate contest, if including counsel fees, is applicable solely to contests after probate first had, and does not embrace a contest upon the original propounding of a purported will. Estate of Tiffany, 36.

Costs and Counsel Fees.—Code of Civil Procedure, Section 1021. Discriminates between counsel fees and costs.—Estate of McGinn, 313.

Costs—Whether Include Counsel Fees.—The probate statutes in speaking of costs mean simply the costs of the court, the expenses incidental to the proceedings in the case, apart from counsel fees.—Estate of McGinn, 313.

Will Contest—Costs and Counsel Fees.—Counsel fees in a will contest have no proper place in a bill of costs, and may be stricken out on motion.—Estate of McGinn, 313.

Will Contest—Costs.—Fees of Jury, Clerk, Sheriff and Shorthand Reporter taxed as costs of contestants upon revocation of probate of will.—Estate of McGinn, 315.

Will Contest—Costs—Mileage of Witness.—Mileage from San Luis Obispo to San Francisco and return disallowed as costs; it appearing that the residence of witness more than thirty miles distant from place of trial, and that he, although demanding and being refused his fees, nevertheless voluntarily attended.—Estate of McGinn, 315.

Will Contest—Costs—Witness Fees.—A witness coming from San Luis Obispo to San Francisco (not obliged to attend) only allowed two days' fees; reduced from claim of six days.—Estate of McGinn, 315.

Will Contest—Costs—Witness Fees.—Parties contestant to a proceeding to revoke the probate of a will are not entitled to witness fees for testimony in their own behalf, nor to mileage.—Estate of McGinn, 315.

Will Contest—Costs.—Fees of "Expert" Witnesses cannot be taxed differently from those of other witnesses, as the court has no power under the statute to allow other than ordinary witness fees.—Estate of McGinn, 315.

Will Contest—Costs—Service of Subpoenas.—Item in cost bill, service of twenty-seven subpoenas at \$1.50 each, disallowed; no return of service having been made, and it not appearing by whom served, and charge being in excess of fee bill.—Estate of McGinn, 315.

Will Contest.—Items in Cost Bill for Alleged Taking of Depositions disallowed, upon objections that alleged witnesses appeared at trial, that alleged depositions never returned or filed, and that items were excessive.—Estate of McGinn, 315.

Will Contest.—Item in Cost Bill of Attorney Fee of Contestant upon revocation of probate of will disallowed as improper; construing Code of Civil Procedure, section 1332 with sections 1716 and 1021.—Estate of McGinn, 315.

COUNSEL FEES.

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See Jurisdiction.

CUSTODY OF CHILD.

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DEATH.

Death may be Presumed Within a Period Less than Seven Years from the time of the last tidings or trace of an absentee, when the

circumstances leave no other probable conclusion.—Estate of Luesmann, 531.

Death—Presumption from Unexplained Absence.—In addition to the legal presumption arising from unexplained absence for seven years, certain facts have been noticed by courts as grounds on which inferences of death may rest. But no general or certain rule can be established; each case must be decided upon the facts, and the probabilities that life has been destroyed.—Estate of Kustel, 1.

Death—Presumption When Vessel Fails to Return.—The fact of death may be found from the lapse of a shorter period than seven years where one sails in an unseaworthy vessel on the night of a violent storm and the vessel is unheard of for a long time after the voyage should have been accomplished.—Estate of Kustel, 1.

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DISTRIBUTION OF ESTATE.

Distribution—Premature Application for.—The application of the husband in this case for distribution, having been filed before the children attained their majority, is premature and must be denied.—Estate of Berton, 319.

Distribution—Delivery to Foreign Administrator.—Upon an application, under section 1667, Code of Civil Procedure, for an order for delivery to a foreign administrator with the will annexed of an estate in this state which is treated as personalty, the validity of the will is to be determined by the courts of the domicile of the testatrix, and according to the laws of such domicile, and not by the courts or according to the laws of this state.—Estate of Skerrett, 552.

Foreign Wills—Distribution of Estate.—Code of Civil Procedure, sections 1322 and 1667, are, upon an application under the latter section, to be read together, and when so read, the reference in section 1667 to another "state" includes a foreign country.—Estate of Skerrett, 552.

See Taxes.

DOMICILE AND RESIDENCE.

Domicile.—"Inhabitant" and "Resident" are synonymous terms in law, and can, strictly speaking, be applied only to persons domiciled in a place with the intent there to remain.—Guardianship of Deisen, 463.

Domicile is the Place Whence a Person Goes for Labor or Other temporary purpose and whither he returns in season of repose. It is the place where a person has his home, or his principal home, or where he has his family residence and personal place of business; that residence from which there is no present intention to remove or to which there is a general intention to return.—Estate of Sweet, 460.

Domicile.—The Acts and Conduct of a Person are more conclusive in determining his domicile than are his declarations.—Estate of Sweet, 460.

See Domicile, 53.

EQUITABLE CONVERSION.

See Conversion.

EVIDENCE.

See Claims Against Decedent.

Note.

right of party to testify, where the adverse party is an executor, of facts occurring before death of decedent, 52.

presumption of death from long-continued absence, 3-18.

EXECUTORS AND ADMINISTRATORS.

1. Appointment—Persons Entitled to Letters.

Administration—What Law Governs.—Where Applicants Claim Under Different Classes, the law at the time of the hearing governs; a person may be entitled to letters at the time of filing his petition under the first class, and yet, at the time of hearing, the statute may be so changed that he will be in the second class, and a person who was in the fifth class might, by such change, then be in the first class.—Estate of Herold, 271.

Administration—Right of Minor to Letters of Administration.—Minors are entitled to letters of administration on an equality with persons of full age, except that the letters cannot issue to them directly, but to their guardians for them.—Estate of Herold, 271.

Administration—Right of Minor to Letters.—The right of minor children (their father being dead) to letters of administration on the estate of their mother comes into being at the moment of her death, and not at the time their guardian is appointed.—Estate of Herold, 271.

Administration—Right of Minor to Letters as Against Public Administrator.—Where minors are the sole heirs to their mother's estate, they are entitled to letters of administration thereon as against the public administrator.—Estate of Herold, 271.

Administration—Priority as Between Petitions Filed at Different Times.—The fact that the public administrator files the first petition

for letters of administration does not give him a better right than the guardians of the minor children of the deceased, whose petition is filed a few days later. The statute nowhere provides for or recognizes any superior right for any such reason.—Estate of Herold, 271.

2. Death of Executor.

Executor.—No Executor of an Executor is, as such, entitled to administer on the estate of the first testator.—Estate of Carlson, 276.

Executor.—Upon the Death of the Sole Executor of a will, letters of administration with the will annexed of the estate of the testator left unadministered must be granted as designated and provided for in Code of Civil Procedure, section 1365.—Estate of Carlson, 276.

Executor.—Where an Executor Died Pending Administration, and his executor waited until seven months after his death before applying for letters of administration with the will annexed on the estate of the first testator, and the public administrator filed a counter-petition four days later, and where it does not appear that the public administrator was ever notified of the death of the executor of the first testator, the contention that the public administrator had waived his right to letters by his laches is untenable.—Estate of Carlson, 276.

3. Removal of Executor.

Executor—Removal for Failure to File Inventory.—A court will not remove executors for failure to file an inventory within the precise time prescribed by statute, when their dereliction arises because of the negligence of their counsel.—Estate of Graber, 345.

Executor.—The Removal of an Executor Requires a Stronger Case than removal of an administrator.—Estate of Graber, 3455.

4. Assets of Estate.

Administration.—An Executory Contract is not Itself an Asset; it is the subject matter of the contract that is. This principle applies to an executory contract with respect to foreign realty, which is not a local asset for administration purposes.—Estate of Blythe, 152.

5. Authority and Liability as to Foreign Assets.

Administrator—Liability in Dealing with Foreign Lands.—As there is no obligation upon an administrator to go into a foreign country and deal with lands there, consequently no liability can be claimed on his part to have attached to him officially by reason of his having done so.—Estate of Blythe, 152.

Administrator—Right to Expend Money on Foreign Lands.—A demurrer to the "Petition of administrator for leave to expend \$10,000, or such other sum as may be sufficient, to preserve the Mexican lands from forfeiture under the conditions of the grants," was sustained on the ground that the order prayed for was beyond the jurisdiction of the court to make.—Estate of Blythe, 152.

Administrator—Right to Expend Money on Foreign Lands.—A previous ruling of the court, authorizing an administrator to deal with lands situated in a foreign jurisdiction, does not justify an adherence to such ruling if, upon a new application, the true character of the issue, as a jurisdictional one, is exposed.—Estate of Blythe, 152.

Administrator—Right to Deal with Foreign Lands.—An administrator has no legal right to deal with lands situated in a foreign country as if they were within the local jurisdiction.—Estate of Blythe, 152.

Administrator—Authority Over Foreign Lands.—A California administrator has no power officially in Mexico over lands there; and the facts in this case show that neither personally nor by virtue of his office can he claim or take title to lands there.—Estate of Blythe, 152.

Administrator—Responsibility for Foreign Assets.—While an administrator must include in his inventory all estate of his decedent coming to his possession or knowledge, it does not follow that he is bound to account for assets situate in a foreign jurisdiction.—Estate of Blythe, 152.

Administrator—Authority in Foreign Country.—A California court cannot endow its appointee with any official character as administrator beyond the borders of the state, and when he appears elsewhere, he is simply a citizen abroad without any representative faculty whatever.—Estate of Blythe, 152.

Administrator—Authority Beyond Territory of Appointment.—Where an administrator has no power beyond the territory of his appointment, he can have no duty with respect to any matter extra-territorium.—Estate of Blythe, 152.

See Accounts of Administrator; Administration in General; Compensation of Administrators; Sale by Executor; Special Administrators.

Note.

removal of executor for failure to return inventory, 353.

right of minors to letters of administration, 276.

duty and authority as to foreign estates, 165.

EXPENSES OF ADMINISTRATION.

See Funeral Expenses; Special Administrators.

EXPERT WITNESSES.

See Costs and Counsel Fees; Insanity and Insane Delusions.

FAMILY ALLOWANCE.

Family Allowance.—In Determining What is a Reasonable Allowance for the maintenance of the family of a decedent, regard should

be had to the condition of the estate and the mode in which the family had lived during the lifetime of the deceased.—Estate of Hessler, 354.

Family Allowance.—The Right to an Allowance Commences from the Death of the decedent.—Estate of Hessler, 354.

See Compensation of Administrators; Costs and Counsel Fees.

FOREIGN ADMINISTRATOR.

See Distribution.

FOREIGN ASSETS OF ESTATE.

See Executors and Administrators, 5; Inventory, 2.

FOREIGN ESTATES.

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FOREIGN JUDGMENTS.

See Judgments.

FOREIGN PROBATE.

See Probate of Wills, 2, 3.

FORGERY.

See Contest of Wills.

FRAUD.

See Contest of Wills.

FUNERAL EXPENSES.

Funeral Expenses—Extent of Expenditures Therefor.—While suitable respect should be shown to the deceased in the matter of a burial place and monument, and while the court in its discretion can make allowance out of the estate therefor, yet large expenditures in this way represent the sentiments of the persons that incur them, rather than the necessary expenditure of trust funds, and courts should be cautious in allowing expenditures of this character.—Estate of Hessler, 354.

Funeral Expenses.—The Cost of a Monument is a part of the funeral expenses, and a reasonable amount for this purpose may be allowed. Estate of Hessler, 354.

Note.

whether may include monument, 362.

GOODWILL OF BUSINESS.

See Inventory, 2.

GUARDIANS.**1. Of Minors.**

Guardians—Jurisdictional Requisites for Appointing.—The statute prescribes two jurisdictional requisites in the appointment of guardians for minors: First, the minor must have no guardian at the time application is made; and second, he must be an inhabitant or resident of the country in which the court is held.—Guardianship of Deisen, 463.

Guardian—Appointment for Nonresident Minors.—Where minors of tender years are brought into this state for the purpose of being exhibited before the public in song and dance performances, and then taken to another state for the same purpose, the superior court, by virtue of its equity powers, has jurisdiction, although the minors are not strictly inhabitants or residents of this state, to guard their welfare by appointing a suitable person as their guardian.—Guardianship of Deisen, 463.

2. Of Insane or Incompetent Persons.

Guardianship.—Where an Insane Person, While Sane, has selected a conservator of her property, the court should regard such selection as the expression of the wishes of a competent person, and, where the management of such agent has been prudent and judicious, the best interests of her estate will be promoted by continuing it in his hands.—Estate of Tobelmann, 18.

Guardianship.—A Divorced Husband is a Stranger to a Proceeding for the appointment of a guardian of his former wife, an insane person, except so far as he is concerned in the succession of the children of the marriage to her estate.—Estate of Tobelmann, 18.

Guardianship.—In an Application by a Divorced Husband for letters of guardianship of the person and estate of his former wife, an insane person, the decree of divorce must be taken as correct and conclusive.—Estate of Tobelmann, 18.

Guardian of Incompetent—Matters for Consideration in Appointing. In proceedings for the appointment of a guardian for an alleged incompetent and for her estate, the opinion of an alienist as to her mental condition over sixteen years before, when he visited her in a social way and conversed with her, is not too remote for consideration, because in such cases the personal history of the subject and her heredity, temperament and diathesis, are taken into account to enable an intelligent appreciation to be had by the investigator, whose judgment must be instructed as to effect or defect by searching for cause, however far back it may seem necessary to trace it. The concern of the court, however, is not with the condition of the alleged incompetent at such previous time, but with her status as to competency of mind at the date of the application for guardianship and at the time of transactions therein referred to as conceived in fraud with a

view to impose upon her and obtain her property through her mental weakness.—Estate and Guardianship of Moxey, 369.

Guardian of Incompetent—Nature of Proceedings to Appoint.—A proceeding for the appointment of a guardian for an incompetent person and for his estate, as provided by section 1763 of the Code of Civil Procedure, is not an inquisition in lunacy, but an inquiry as to mental incompetency to manage one's property.—Estate and Guardianship of Moxey, 369.

Guardian of Incompetent—Jurisdiction of Court to Appoint.—Whatever doubt existed in former times as to the authority of courts to appoint guardians for incompetent persons, as distinguished from persons actually insane, is now removed in this state by the explicit language of the statute, conferring jurisdiction in this class of cases, and making it the peculiar province of this tribunal to protect any person proved to be within the purview of the statute.—Estate and Guardianship of Moxey, 369.

Guardian of Incompetent—Matters for Consideration in Appointing. In determining whether a guardian should be appointed for an alleged incompetent woman, it is important to consider the value and character of her property, the persons by whom she is and has been surrounded, and whether they are not seeking to profit by her mental weakness and to obtain advantages which in other circumstances she might resist, and also whether she has in fact been overreached and imposed upon, and is in the exclusive control and keeping of persons who have acquired absolute dominion over her and deceived her to their own gain.—Estate and Guardianship of Moxey, 369.

Guardian of Incompetent—When Should be Appointed.—The claim of the petitioner in this case that the respondent is incompetent, that she is incapable of taking care of herself and her property, and that she is likely to be imposed upon by designing and artful persons, is held by the court upon an examination of the evidence, to be fully made out, and the petition for the appointment of a guardian of her person and estate is granted.—Estate and Guardianship of Moxey, 369.

3. Reduction of Bond.

Guardian—Application for Reduction of Bond.—The application of the guardian in this case for a reduction of his bond was granted by the court.—Estate of Dresel, 457.

Note.

appointment in the case of nonresidents, 467.

issuance of letters of administration to guardian of minor, 276.

HOLOGRAPHS.

See Probate of Wills.

HOMESTEADS.

Homestead.—There is No Limitation as to the Value of property set aside as a probate homestead.—Estate of Hessler, 354.

Homestead.—Where there are No Children, the widow constitutes the family of the decedent.—Estate of Hessler, 354.

Homestead—Right of Surviving Husband.—Where a wife declares a homestead upon the community property, and after her death the surviving husband sells such property, he has no right to have a probate homestead set apart to him from her separate estate.—Estate of Ackerman, 269.

Homestead—Setting Apart from Community Property.—The requirement of Code of Civil Procedure, section 1465, that a homestead be set apart for the use of the surviving husband or wife and the minor children out of the common property, is mandatory, and if there is suitable property in the estate for the purpose it must be set aside. Estate of Hessler, 354.

Homestead—Setting Apart from Community Property Absolutely.—If a homestead is selected from the common property, it cannot be set apart for a limited period only. It is of no consequence that the widow is old and will not require the homestead for many years, or that she will receive three-fourths of the estate upon distribution. It is plainly the duty of the court, under the statute, to award a homestead to her, and it is then taken out of the estate and becomes her property, with absolute power of disposition.—Estate of Hessler, 354.

HUSBAND AND WIFE.

See Community Property; Marriage.

Note.

presumption of survivorship when they perish in common disaster, 16.

ILLEGITIMATES.

Illegitimates—Acknowledgment by Parent.—The Declarations of a Man since deceased are admissible to prove that he was the father of an illegitimate child who claims to have been legitimated by public acknowledgment.—Estate of Jessup, 476.

Illegitimates.—In Order to Constitute a Public Acknowledgment of an illegitimate child by his father, the father must treat, receive or acknowledge the child as if he were his own legitimate offspring; and in order that proof thereof may be made by disinterested parties, and fraud and imposition avoided, all of these must be done openly and publicly, not secretly.—Estate of Jessup, 476.

Illegitimates—Reception into Family.—The most satisfactory way of establishing the paternity and public acknowledgment of an illegitimate child is by proof that he has been received into the family of

the father and given the family name; but this is not necessary where there is sufficient proof of a reason for not having done either.—Estate of Jessup, 476.

Illegitimates—Acknowledgment by Parent.—The evidence in this case is held to establish that the petitioner was the illegitimate child of the decedent (an unmarried man), and that the decedent publicly acknowledged his paternity of the petitioner.—Estate of Jessup, 476.

Illegitimates—Acknowledgment by Parent.—The institution of heirs is the primary object of section 230 of the Civil Code. The succession of property rights is incidental; it is a status that is involved, the relation of the child to society.—Estate of Jessup, 476.

Illegitimates—Construction of Code Sections.—Section 230 of the Civil Code, relates only to minors, who alone are subjects of adoption, and section 1387, provides for giving to illegitimate adults the capacity of inheritance. The latter section is not a limitation on the former one.—Estate of Jessup, 476.

INCOMPETENTS.

See Guardians, 2; Insane Persons; Wills.

INFANTS.

See Guardians; Minors.

INHABITANT.

See Domicile.

INHERITANCE TAX.

1. In General.

Inheritance Tax—Bequest for Masses.—Bequests for masses are for charitable purposes, and therefore exempt from the operation of the collateral inheritance tax act of 1899.—Estate of Herzo, 165.

Inheritance Tax—Bequest for Altar.—A bequest to beautify the altar of a church is for a charitable purpose, and therefore not subject to the collateral inheritance tax act of 1899.—Estate of Herzo, 165.

Inheritance Tax—Former Adjudication.—The establishment by a court of the collateral inheritance tax payable by an estate is an adjudication upon that subject which binds the state as well as the estate, as to all questions passed upon.—Estate of Gordon, 138.

2. Limitation of Actions.

Inheritance Tax—Statute of Limitations.—The defense of the statute of limitations is applicable to a proceeding against executors for the collection of collateral inheritance tax. Such a proceeding is barred under the provisions of section 338, Code of Civil Procedure, by the lapse of three years after the accrual of the liability; and

the liability is complete at or before the close of the administration. Estate of Gordon, 138.

Inheritance Tax—Limitations.—If the Executor Occupies the Position of a Trustee for the state as to the collateral inheritance tax, this relation does not continue in the manner to prevent the running of the statute of limitations after proceedings have been had to fix the tax, and the amount thereof fixed and ordered paid, and the residue of the estate distributed and the administration closed.—Estate of Gordon, 138.

INJUSTICE OF WILL.

See Insanity and Insane Delusions, 2; Wills, 5.

Note.

Insanity.

belief in spiritualism as evidence of insanity, 31.

INSANITY AND INSANE DELUSIONS.

1. In General.

Insane Persons Distinguished from Incompetent Persons.—"Insane" and "incompetent" are not necessarily convertible terms; a person may be incompetent by reason of insanity, or from some other cause incapable of caring for his property.—Estate and Guardianship of Moxey, 369.

Insanity.—A Lucid Interval is a Period of Mental Clearness enjoyed by an insane person; it is an interval during which the patient is restored so far as to be able beyond doubt to understand and to do the act with such reason, memory and judgment as to make it legal. Estate of Kershow, 213.

Insanity.—A Statement that a Person may have had Reasoning Power and yet have been unsound in mind imports a contradiction in terms, as does the statement that a person had strong will power and yet was unsound in mind.—Estate of Kershow, 213.

Mental Incompetency—Sudden Change of Affections.—Sudden and groundless suspicions of the affection and fidelity of tried and trusted relatives and friends are common symptoms of unsoundness of mind, and so are hastily conceived affections for and confidences in mere strangers and newly made acquaintances.—Estate and Guardianship of Moxey, 369.

2. Evidence of Insanity.

Mental Competency—Value of Opinion Evidence.—The opinion of witnesses as to the soundness of mind of a person sought to be put under guardianship as an incompetent are not entitled to so much weight as facts, especially when conflicting; for when a fact is established, it is a fact and cannot be overcome, while an opinion is but an opinion, and it may be true or false in its inference.—Estate and Guardianship of Moxey, 369.

Insanity of Testator—Opinion of Witness.—A witness called on behalf of the proponent of a will to prove the sanity of the testator, who is not an expert, is not qualified to give his opinion where he did not know that about the time of the execution of the will the testator had been adjudged dangerous to be at large, and was sent to the home of the inebriates, and shortly after to the state insane asylum; all he knew being based upon the fact that he never heard the testator's insanity questioned, and saw nothing particularly wrong about his mind.—Estate of Spangler, 22.

Insanity of Testator.—Upon the Issue of Sanity Raised by a Contest to the probate of a will, the court is concerned only with the fact of insanity, whatever cause the insanity may have proceeded from being immaterial.—Estate of Spangler, 22.

Insanity of Testator.—The Instrument Propounded as a Will should itself be considered in connection with other evidence, upon the issue of the testator's sanity.—Estate of Spangler, 22.

Insanity of Testator—Injustice of Will.—Where the testator's estate was small, and he left nothing to his wife, who had been his spouse for twenty-five years, and was aged and infirm, remitting her to her community rights, but bequeathed all his estate to strangers, this fact may be considered as evidence in connection with other facts and testimony, upon the issue as to the insanity of testator.—Estate of Spangler, 22.

Insanity of Testator—When Established by Evidence.—Where a will gives all the estate of the testator to strangers, remitting the widow to her community rights, the probate thereof should be denied if it appears that the testator while young became insane and was confined to a straight-jacket for six months; that he had a brother and cousin who were insane; that he embraced spiritualism a few years before his death and did many strange things under alleged spiritualistic influences; that he had a great many peculiar beliefs; that less than a month after making his will he was sent to the home of inebriates as dangerously insane, and nine days thereafter was formally adjudged insane and sent to the state asylum.—Estate of Spangler, 22.

See Guardians, 2; Wills, 1.

INTENTION OF TESTATOR.

See Wills, 8.

INTERLINEATIONS.

See Wills, 6.

INTESTACY.

See Wills, 15.

INTOXICANTS.

See Wills, 3.

INSANITY.

Note.

removal of executor for failure to return inventory, 353.

INVENTORY AND APPRAISEMENT.**1. Time for Filing.**

Inventory—Time for Filing.—The statute prescribing the time within which the inventory and appraisement of an estate of a decedent must be filed is directory merely.—Estate of Graber, 345.

Inventory—Revocation of Letters for Failure to File.—The statutory authority of a court to revoke letters testamentary or of administration, in case the executor or administrator fails to return an inventory within a prescribed time, is discretionary.—Estate of Graber, 345.

Inventory—Time for Filing.—An executor should file an inventory at the earliest moment possible, and if other property subsequently comes to his knowledge, he should file supplemental inventories from time to time; it is, however, the application of the law to a particular state of facts that makes a case, and each case must find its justification or exculpation in these peculiar facts.—Estate of Graber, 345.

2. Property to be Included.

Inventory—What must be Included in.—An executor must return in the inventory everything of value belonging to the estate of his testator, whether it is property owned by or a debt due the estate.—Estate of Levinson, 325.

Inventory.—The Goodwill of a Business is Property, so is a Trade-mark; and where the decedent was a member of a partnership, the goodwill of the business and a trademark owned by it should be embraced in the schedule of assets in the inventory, unless there is a clear provision in the articles of partnership excluding the estate of a deceased partner from a share in the value thereof.—Estate of Levinson, 325.

Inventory.—Assets of a Firm Include the Goodwill of the business and trademarks owned by the firm.—Estate of Levinson, 325.

Inventory—Doubtful Assets.—Even if the Question is in Doubt and equally balanced, whether an estate is or is not to be deprived of a share of the goodwill of a business trademark, it must be included in the inventory.—Estate of Levinson, 325.

Inventory—Assets in Foreign Jurisdiction.—Code of Civil Procedure, section 1443, with respect to the inventory of decedents' estates, does not enlarge the well-settled liability of administrators. That section relates only to estates actually or in legal contemplation within this state.—Estate of Blythe, 152.

See Appraisers of Estate.

JOINDER OF CAUSES OF ACTION.

See Contest of Wills.

JUDGMENTS.

Foreign Decrees.—The Constitutional Provision that Full Faith and Credit shall be given in each state to the judicial proceedings of every other state is not designed to extend the jurisdiction of local courts or to extend beyond its limits the operation of a local decree, but to provide a mode of authenticating evidence of the record of a judicial proceeding had in one state, so that a proper general result of it may conveniently be attained in every other state against persons and things justly within the range of the proceeding.—Estate of Kershaw, 213.

JURISDICTION.**1. Chancery Jurisdiction.**

Probate Court—Chancery Jurisdiction.—The superior court, sitting in probate, has no chancery side.—Estate of Blythe, 152.

2. Probate Jurisdiction.

Probate Court—Limited Jurisdiction.—The superior court, sitting in probate, deals only with administrations, and cannot assume jurisdiction, except the object upon which it is to operate is before it.—Estate of Blythe, 152.

Probate Jurisdiction—Regulation by Legislature.—The probate jurisdiction of the superior court is essentially under the control of the legislature, which may enlarge or restrict it.—Estate of Sutro, 120.

Jurisdiction of Probate Court—How Far Extends.—Prior to the amendment of 1895 to section 738 of the Code of Civil Procedure, jurisdiction to determine the rights of heirs, devisees and legatees, and the validity of testamentary trusts, appears to have been vested exclusively in the superior court sitting in probate.—Estate of Sutro, 120.

LAPSED LEGACY.

See Wills, 17.

LEGACIES.

See Annuities; Wills.

LETTERS OF ADMINISTRATION.

See Executors and Administrators.

LIMITATION.

See Wills, 9.

LIMITATION OF ACTIONS.

See Inheritance Tax, 2.

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Lost and Destroyed Wills.

- status of such wills in general, 427.
- presumption of revocation from inability to find will, 428.
- rebuttal of this presumption, 428.
- distinction where will lost before and after death, 429.
- fraudulent destruction in lifetime of testator, statutes requiring proof thereof, 430.
- fraudulent destruction of will, what constitutes, 433.
- opportunity to destroy as evidence of fraudulent destruction, 433.
- undue influence in procuring destruction of will, 434.
- proof of existence of will, 435.
- stipulation or admission as to contents, 435.
- necessity for instituting search for missing will, 435.
- character of evidence admissible to establish will, 436.
- declarations of testator as to existence of will, 437.
- burden of proof respecting lost or destroyed will, 437.
- quantum of proof necessary to establish will, 437.
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- lapse of time as affecting quantum of proof necessary, 439.
- number of witnesses testifying to execution or contents, 440.
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- establishing will by proof of incapacity of testator to revoke it, 442.
- establishing will by revoking a former one, 442.
- proof of execution of will, 442.
- necessity of calling all subscribing witnesses to prove will, 443.
- inability of subscribing witness to recollect facts, 443.
- testimony of attorney that he drew will, 444.
- proof of continued existence of will, 444.
- rebuttal of presumption of revocation of will, 444.
- proof of contents of lost or destroyed will, 445.
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- discrepancy of evidence as to contents of will, 448.
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- evidence of witness without positive recollection, 448.
- proof of contents in case of fraudulent destruction, 449.
- witness who only heard will read, 449.
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- use of copy or draft in proving contents, 450.
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- pencil draft compared by scrivener with lost will, 451.
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- will recorded at request of testator, 451.

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LUcid INTERVAL.

See Insanity and Insane Delusions, 1.

LUNATICS.

See Insanity and Insane Delusions.

MARRIAGE.**1. In General.**

Marriage—Mercenary Alliances not Favored.—Mercenary marriages are abhorred in equity, and not favored otherwise where the surroundings point to an unworthy motive, and the conduct of the party who is pecuniarily benefited suggests insincerity or bad faith, and indicates that he has taken an undue advantage of the other's weakness of will or confidence in him, springing from intimacy of relation.—Estate and Guardianship of Moxey, 369.

Marriage—Duty to Make Public.—When parties are married, though ceremonially, it is their duty to themselves and their obligation to the State to follow up the rite by living together as husband and wife and affording public evidence of that relation. So far as the immediate interest involved is concerned, it matters little compared with the interests of organized society.—Estate and Guardianship of Moxey, 369.

Marriage—Publicity—Nature and Sanctity of Institution.—Marriage is more than a contract; it is a status; it is an institution of society and its foundation; it does not come from society, but contrariwise; it is the parent of society, and it is extremely important that its stability shall be secured, and that its contraction should be surrounded by safeguards and its sanctity upheld; and every solemnization of marriage should be in the face of the public; there should be no secrecy either in ceremony or in connubiation.—Estate and Guardianship of Moxey, 369.

2. Contracts of Marriage.

Marriage Contract—Conflict of Laws.—A marriage contract is to be construed according to the law where it is made and executed.—Estate of Sweet, 460.

Marriage Contract—Conflict of Laws.—The whole of the foreign law is adopted in a marriage contract under the *lex loci contractus*, except the remedy, and the actual intention is to be interpreted according to that law.—Estate of Sweet, 460.

3. Business Transactions Between Betrothed Persons.

Betrothed Persons—Business Transactions Between.—The relations of betrothed persons being of an extremely confidential character, the law imposes, in case of business transactions between them, the utmost circumspection and care to forefend fraud. If the woman is about to convey property to the man, he should see that she has the assistance of a competent attorney.—Estate and Guardianship of Moxey, 369.

Betrothed Persons—Conveyances Between—Suggestions of Fraud.—The fact that a deed from a woman to her fiancé purports to be based on a pecuniary consideration, when in fact there is none, is a strongly suspicious circumstance, particularly when she is suspected of mental weakness.—Estate and Guardianship of Moxey, 369.

Betrothed Persons—Conveyances Between—Secrecy.—Where a woman, suspected of mental weakness, gratuitously conveys property to the man to whom she is betrothed, the fact that the deed is prepared and executed in haste; that the gift is excessive; that there is lack of opportunity for calm consideration and reflection; that the deed recites a money consideration, and a covenant of warranty and an agreement to furnish an abstract up to date; that the grantee virtually dictated or supervised the making of the deed, while his intimate friend and associate prepared the instrument; and that the grantee is admitted to have influence over the grantor, through her fatuous fondness for him—all these are circumstances strongly suggestive of fraud.—Estate and Guardianship of Moxey, 369.

MASSSES.

See Inheritance Tax, 1.

MEXICAN LAW OF ADMINISTRATION.

See Administration in General; Conflict of Laws.

MILEAGE FEES.

See Costs and Counsel Fees.

MINOR HEIRS.

See Attorneys; Executors and Administrators.

MONUMENT

See Funeral Expenses.

NEW TRIAL.

New Trial—Law of the Case.—The Rule that the Lower Court on the retrial of a case sent back by the appellate court must follow the law laid down by the superior tribunal can be invoked only when the

same facts and questions are presented on the second trial.—Estate of Jessup, 476.

OLOGRAPHS.

See Probate of Wills, 4.

OPINION EVIDENCE.

See Insanity, 2.

PARENT AND CHILD.

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Note.

presumption of survivorship when they perish in common disaster, 17

PARTNERSHIP ASSETS.

See Sale by Executor.

PER CAPITA.

See Wills, 14.

PLEADING.

Pleading.—Amendment to Pleadings Should be Allowed with great liberality; but an amendment is not permissible which affects a radical change in the cause of action and substitutes new issues already tendered and made by the opposite party.—Estate of Sweet, 458.

Pleading.—Amendment to a Pleading is a Correction of an error committed in the progress of a cause. It is to correct, to improve, to rectify something deficient or defective in the original, not to substitute new for old. The principle to be regarded is, that where the effect of the proposed "amendment" is to state a proposition contrary to the position assumed in the original pleading, or to the theory upon which the case has been tried or the litigation conducted, then it is not an amendment.—Estate of Sweet, 458.

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PRESUMPTION OF DEATH.

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PROBATE OF WILLS.

1. In General.

Probate of Will—Compliance with Statutes.—The admission of wills to probate, whether of residents or nonresidents, being a statutory matter, the court must be controlled in that regard by the provisions of the code, and it ordinarily cannot be governed by arguments of convenience or inconvenience or of hardship. Nor can it amplify its jurisdiction nor arrogate any power beyond that expressly given by the statute.—Estate of Dunsmuir, 53.

Probate of Will—Setting Aside on Motion.—An order admitting a will to probate, void upon its face, may be set aside at any time upon motion in the probate court, there being no limitation upon the time within which such motion may be made and entertained, and it being unnecessary to resort to a bill in equity for the purpose.—Estate of Dunsmuir, 53.

Probate of Will—Filing Certificate of Proof.—While it has been the almost uniform practice here from early times to file a certificate of the proof of the will and of the facts found, signed by the judge and attested by the seal of the court and attached to the will, together with the transcript of the testimony of the witnesses, such procedure is not strictly required except in contested cases.—Estate of Dunsmuir, 53.

Probate of Will—Statutory Residence, in this State, Constitutes Domicile. Under the provisions of the code, the words "residence" and "domicile" are used synonymously and interchangeably; and a finding that the testator was a resident of San Francisco at the time of his death is, in effect, a finding that he was domiciled there.—Estate of Dunsmuir, 53.

Acknowledgment of Will—Failure of Memory of Witnesses.—The failure of the attesting witnesses to the will involved in the present case, they being the nurse and physician attending the alleged testatrix at the time of the execution of the instrument, to recollect whether she acknowledged the paper as her will, is adversely commented on by the court, especially in view of the fact that the instrument purports to have been executed at a recent date and in the presence of impending death.—Estate of Casey, 68.

2. Conflict of Laws.

Probate of Will—A Will must, in the First Instance, be Probated in the forum of the domicile, that being the principal, primary and original place of administration. The law of the domicile governs the admission of wills to probate.—Estate of Dunsmuir, 53.

Probate of Will—Extraterritorial Force of Decree.—A probate proceeding is a proceeding in rem, and a decree admitting a will to probate is confined in its operation to things within the state setting up the court.—Estate of Kershow, 213.

Probate of Will—Foreign Decree.—"Full Faith and Credit" is given to a probate decree abroad, when the same faith and credit is given to it which it has at home, which is, that it is conclusive evidence of the validity of the will as affecting title to things within the jurisdictional limits of the court at the death of the testator, whether such title comes in contest within or without those limits; but de jure no evidence whatever of title to things not then within those limits.—Estate of Kershow, 213.

Probate of Will—When not Barred by Prior Foreign Probate.—Where a testator's domicile at the time of his death was in this state, and he left personal estate therein, a decree of a court of another state, rendered upon constructive notice, admitting to probate a prior will, is no bar to the jurisdiction of a court of this state to admit to probate a subsequent will presented to it for that purpose.—Estate of Kershow, 213.

3. Foreign Probate.

See Contests of Will.

Foreign Probate—Domestic Wills.—Sections 1322-1324 of the Code of Civil Procedure, authorizing the admission to probate of a will upon production of an authenticated copy of the will and the record of its admission to probate elsewhere, have no application to the case of domestic wills, but apply only to foreign wills; that is, those made in other states or countries by persons domiciled outside this state. The heading of the article of the code in which sections 1322-1324 are contained is to be taken in connection with the sections themselves for the purposes of construction.—Estate of Dunsmuir, 53.

Foreign Probate.—Where a Testator was Domiciled in this State at the time of his death, the courts of the forum of the domicile have no authority to admit his will to probate in this jurisdiction, upon the mere production of a duly authenticated copy of the will and the record of its admission to probate in a foreign country or sister state.—Estate of Dunsmuir, 53.

Foreign Probate.—An Order Admitting a Will to Probate in this Jurisdiction, upon production of a duly authenticated record containing a copy of the will and proving its admission to probate in a foreign country, is, where it affirmatively appears from the record that the testator was a resident of San Francisco at his death, beyond the jurisdiction of the court; and it will, on motion, be set aside as void upon its face.—Estate of Dunsmuir, 53.

4. Olographic Will.

Olograph.—An Instrument Testamentary in Character, if proved to be entirely written, dated and signed by the author, is established as an olographic will.—Estate of Kustel, 1.

5. Destroyed Wills.

Probate of Destroyed Wills.—An Olographic Will destroyed by a friend of the testator in his presence, as being of no further use after a typewritten copy thereof had been made, is not "fraudulently destroyed," within the meaning of these words in the statute providing for the probate of lost or destroyed wills.—Estate of Johnson, 425.

6. Revocation of Probate.

Revocation of Probate—Jurisdiction of Court.—The jurisdiction of a probate judge relating to the revocation of probate is wholly statutory, and in exercising it, he can in no way alter or disregard the provisions of the statute.—Estate of Dalton, 97.

Revocation of Probate—Executor as a Party.—It seems the executor is not a necessary party to a proceeding for the revocation of the probate of a will, instituted after a final decree of distribution is made and he has been discharged.—Estate of Dalton, 97.

Revocation of Probate—Nature of Proceeding—Citation.—A proceeding to revoke the probate of a will is a proceeding in rem and not inter partes; the court already has jurisdiction of the res, and the office of citation is not, like a summons, to give jurisdiction, but to give all parties an opportunity to appear and take sides.—Estate of Dalton, 97.

Revocation of Probate—Nature of Proceeding—Discharge of Executor.—Under sections 1327 and 1328 of the Code of Civil Procedure, providing for the revocation, upon a citation to the executor and others, of the probate of a will within one year after probate, an application therefor may be made notwithstanding a final decree of distribution has been made and the executor discharged. The statute keeps alive ad interim the character of the executor for the purpose of hearing the application for revocation.—Estate of Dalton, 97.

Revocation of Probate—"Proceeding" or "Action."—An application to revoke the probate of a will is a "proceeding" and not an "action."—Estate of Dalton, 97.

Revocation of Probate—Subject Matter and Jurisdiction.—The subject matter in an application to revoke the probate of a will is the same as the subject matter of the proceeding to probate the will. The ultimate should issue, to wit, whether the will should stand as probated, is the same.—Estate of Dalton, 97.

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REVOCATION OF PROBATE.

See Probate of Wills, 6.

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SALE BY EXECUTOR.

Executor's Sale—Confirmation When Sale Made Under Power.—The superior court, sitting in probate, has jurisdiction of an application to confirm a sale of a partnership interest made by an executrix under a power given in the will.—Estate of Fuller, 467.

Executor's Sale—Restraining Confirmation.—One department of the superior court sitting in equity cannot, by enjoining parties to an executor's sale, prevent another department of that court sitting in probate from confirming such sale.—Estate of Fuller, 467.

Executor's Sale.—It is No Answer to an Application to Confirm a sale of a partnership interest, made by an executor under a power in the will, that there was a contract between the decedent and his surviving partner to sell the decedent's interest to the surviving partner.—Estate of Fuller, 467.

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Special Administrator.—Two Items for Expert Witnesses were in this case disallowing the account of a special administrator.—Estate of Tiffany, 36.

A Special Administrator is Without Power to Incur Expense in and about a will contest.—Estate of Tiffany, 36.

A Special Administrator has no Authority to Make Expenditures as to claims having their origin in decedent's lifetime.—Estate of Tiffany, 36.

Special Administrators are Entitled to Counsel in the Administration of their trust.—Estate of Tiffany, 36.

Special Administrators are Entitled to Compensation for services performed in discharging the duties of their trust.—Estate of Tiffany, 36.

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Succession—Conflict of Laws.—The law of the domicile of a deceased person governs the succession to his personal property.—Estate of Sweet, 460.

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- presumption of in case relatives perish in common disaster, 17.

TAXES.

Taxes Against Estate—Payment Before Distribution.—A tax is due immediately after it is levied, within the rule that distribution must not be made until all taxes due from the estate are paid.—Estate of Whartenby, 509.

Taxes Against Estate—Payment Before Distribution.—Section 3752 of the Political Code and section 1669 of the Code of Civil Procedure should be construed together as simultaneous expressions of the legislative will; the former section does repeal the latter by implication.—Estate of Whartenby, 509.

See Inheritance Tax.

TECHNICAL WORDS.

See Wills, 9.

TESTAMENTARY TRUSTS.

See Trusts and Trustees.

TRANSPOSITION OF PARTS OF WILL.

See Wills, 12.

TRUSTS AND TRUSTEES.

Trust.—It is not Necessary to Use the Word "Trust" or "Trustee," or any particular form of words, in creating a trust, so long as the intention of the testator is expressed.—Estate of Tessier, 362.

Trust.—A Person may Declare a Trust Either Directly or Indirectly—the former, by creating a trust *eo nomine* in the forms and terms of a trust; the latter, without affecting to create a trust in words, by evincing an intention which the court will effectuate through the medium of an implied trust.—Estate of Tessier, 362.

Trust.—An Executor may be Both Executor and Trustee. If not named expressly a trustee, the court may determine from the whole will whether he is not to act as trustee.—Estate of Tessier, 362.

Trust.—When the Income of Property is Given to One for Life, and, at his death, the property is given over to another, and no trustee is named in the will, the executor is the trustee to hold the property during the lifetime of the legatee for life.—Estate of Tessier, 362.

Trust.—A Trust will not be Permitted to Fail for Want of a Trustee.—The probate court will determine whether a valid trust has

been created, and may distribute the estate to a trustee, he being entitled to the possession and control of the same.—Estate of Tessier, 362.

Trust.—When a Trust is Created, a Legal Estate Sufficient for the execution of the trust will, if possible, be implied.—Estate of Tessier, 362.

Trust, When Created by Will.—Where a testatrix directs that there be paid monthly to her daughter a specified sum, and to her two granddaughters a like sum, share and share alike, and in case of the death of either of the granddaughters, without issue, the survivor to take the whole of the last named sum; and further provides that on the death of her daughter her estate shall go to her two grandchildren, share and share alike, or to the survivor of the daughter in case of the death of either of the granddaughters; and an executor is appointed by the will, but he is not named as trustee, a trust is created by the will which appoints an executor, but does not name him trustee. Estate of Tessier, 362.

Trust in Realty.—Whether may Rest in Parol.—An express trust in realty can be created only by a writing containing language appropriate for that purpose.—Estate of Ford, 342.

Trust.—Determining Validity Prior to Probate of Will.—Under section 738 of the Code of Civil Procedure, as amended in 1895, the validity of a testamentary trust in real estate may be determined in advance of the probate of the will, in a suit to quiet title or to determine an adverse claim.—Estate of Sutro, 120.

Trustee.—Accounting to Probate Court.—One who is the trustee of a person since deceased, under an express trust voluntarily assumed in the lifetime of the decedent, cannot, by virtue of the Code of Civil Procedure, section 1461, be ordered to account before the court wherein the administration of the decedent's estate is pending.—Estate of Chappelle, 34.

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WILL CONTESTS.

See Contest of Will.

WILLS.**1. Testamentary Capacity in General.**

Wills.—The Constituents of Testamentary Capacity are that the testator has an idea of the character and extent of his property, and is capable of considering the persons to whom and the manner and proportions in which he wishes his property to go.—Estate of Kershow, 213.

Testamentary Capacity—Clinical Chart of Nurse as Evidence.—A clinical chart kept by a nurse, showing, by entry made therein by her, that she administered a powerful opiate to her patient a short time before the patient is alleged to have executed a will, is, in conjunction with the testimony of the nurse as what must have been the stupefying effect of the drug, strong evidence of the condition of the mind of the testatrix at the time of the alleged testamentary act.—Estate of Casey, 68.

Testamentary Capacity—Person in Last Sickness.—The testatrix in this case having executed a will on the last day of her life, at the age of nearly eighty years, the court finds, from the combined effect of her sickness, the frequent administration of opiates, the intensity of her pains, and the other influences acting upon her will and understanding that she must have been incapable of voluntary and intelligent disposition at the time.—Estate of Casey, 68.

2. Testamentary Capacity—Insanity.

Wills.—A Person is of Sound and Disposing Mind who is in full possession of his mental faculties, free from delusion and capable of rationally thinking, acting and determining for himself.—Estate of Kershow, 213.

Wills—Insane Delusion.—Unless a Will is the Very Creature of a morbid delusion put into act and energy, it is a valid will. The mere fact of the possession of a delusion may not be sufficient to render a person incapable of making a valid will; a person of sufficient mental capacity, though under a delusion, may make a will; if the testament is in no way the offspring of such a delusion, it is unaffected by it.—Estate of Kershow, 213.

3. Testamentary Capacity—Alcoholism.

Wills.—Where a Person Who has Indulged in Intoxicants to such an extent as to debilitate his mind suspends his drinking for a period, and by such suspension so far regains possession of his faculties as to admit of the presumption that his will was made during the time of his calm and clear intermission, the testament is held good.—Estate of Kershow, 213.

4. Testamentary Capacity—Undue Influence.

Testamentary Capacity—Undue Influence.—While the law will not presume the exertion of undue influence from the mere fact of opportunity or a motive for its exercise, nor permit it to be found upon suspicion, yet proof must generally be gathered from the circumstances of the case, for very seldom is a direct act of influence patent, as a person intending to control another's action, especially as to a will, is not apt to proclaim that intent; and among the circumstances from which proof must generally be gathered of undue influence exercised upon a testator are: Whether he had formerly intended a different testamentary disposition; whether he was surrounded by those having an object to accomplish to the exclusion of others; whether he was of such weak mind as to be subject to influence; whether the alleged will is such a one as would probably be urged upon him by those surrounding him; whether the persons who surrounded him were benefited by the alleged will to the exclusion of formerly intended beneficiaries.—Estate of Casey, 68.

Testamentary Capacity—Undue Influence.—The court finds from an examination of the evidence in this case that the will dated October 21st was inspired by the proponent, that he was the informing spirit of that testament, and that it was his will rather than of the nominal testatrix.—Estate of Casey, 68.

5. Essentials and Validity of Will.

Wills—Necessity for Operative Words.—A devise cannot be created without the use of operative words.—Estate of Hale, 191.

Wills—Injustice of this Disposition.—The intention of a testator, if lawful, must be given effect, however unjust it may appear to the court.—Estate of Hale, 191.

Wills—Moral Quality of Testament.—A court has neither right nor power to quarrel with the moral quality of a testator's acts; it may not say that he should have made a different disposition; it cannot make a will for him.—Estate of Kershow, 213.

6. Interlineations in Will.

Wills.—An Interlineation in a Will is the Most Significant part of the line, and where a clause as originally written is clear, and the testator subsequently makes an interlineation, it must be assumed that he intended to make the sentence convey a meaning which it did not theretofore express.—Estate of Behrmann, 513.

Wills—Interlineations—Death of Legatees.—Where two legatees named in a will died after its execution, and the testator thereafter noted the fact of their death in his will, and the sums bequeathed to such legatees equal the amount which will go to other legatees if effect is given to an interlineation in that part of the will containing the bequests to them, the inference is strong that by such interlinea-

tion the testator meant to transfer to such legatees the bequests originally made to the legatees who died after the execution of the will.—Estate of Behrmann, 513.

7. Construction of Will.

Wills—Construction.—While It is True that a Will Takes Effect Only from the Date of the death, it may be construed according to the circumstances and the facts existing in the mind of the testator at the date of execution. Whenever a testator refers to an actual existing state of things, or to what he considers to be such a state, his language is referential to the date of the will and not to what may exist at the time of his death, which is a prospective event.—Estate of Pearsons, 250.

Wills.—Every Portion of a Will must be Made to have Its Just Operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.—Estate of Behrmann, 513.

Wills—Construction in Favor of Validity of All Parts.—Where a testator has heirs, and his language will admit of two constructions, one of which will make all the provisions of the will valid, and the other of which would result in creating a legacy to a charitable society in excess of one-third of his estate, which legacy would be void as to such excess under the statute, it will not be presumed that he intended to make a partially invalid bequest, and the court will adopt that construction which is in harmony with the law of wills.—Estate of Behrmann, 513.

Wills.—Every Portion of a Will must be Made to have Its Just Operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.—Estate of Berton, 319.

8. Intention of Testator.

Wills—Intention of Testator.—It Makes no Difference What Language is Used in a will, if the testator's intention can be determined it will be sacredly enforced.—Estate of Hale, 191.

Wills.—The Intention of a Testator must be Ascertained from the words of the will itself; it is not what the testator meant, but what his words mean. The intention to be sought is not what may have existed in his mind, but what is expressed in the language of the instrument itself.—Estate of Hale, 191.

Wills—Intention of Testator—How Determined.—In construing a will the aim of the court is to arrive at the intention of the testator by an examination of the will, and the circumstances surrounding its execution, and the age and experience of the testator.—Estate of Pearsons, 250.

Wills.—The Provisions of the Will in this case show that the testator divided his property into two classes: First, the property held jointly with his aunts; and, second, all other property.—Estate of Pearsons, 250.

Wills.—The Intent of the Testatrix in this Case was, that the estate be kept whole until the children attain their majority, and the bequest to the husband is dependent upon his living until that time, and was in a measure intended as compensation for the services expected of him by the testatrix in the promotion of the welfare and the education of the children.—Estate of Berton, 319.

Wills.—If an Immediate Distribution of the Estate after due administration had in this case been contemplated, the testatrix would not have made the expense of educating the children a charge upon the estate.—Estate of Berton, 319.

9. Interpretation of Particular Words—Technical Words.

Wills.—The Word "Leave" in a Will, as applied to the subject matter, *prima facie* means a disposition by will.—Estate of Hale, 191.

Word "Heirs" not Technically Construed in Will.—The word "heirs" in a testamentary instrument will not be construed technically, if the intention of the testator as disclosed by the context will thereby be defeated and a portion of the will rendered inoperative.—Estate of Fitzgerald, 172.

Wills.—A "Limitation" is Particularly Defined to be a qualification of an estate given; "words of limitation are words which mark out the estate to be taken by the grantee."—Estate of Hale, 191.

Wills.—Technical Words—When Given Popular Meaning.—When a testator is not versed in the meaning of technical terms, it should be presumed that he used his words according to their ordinary meaning and in their popular sense. The words of a will should not be subjected to such a strain as to force them out of the natural channel of construction into the narrow legal groove in which the testator's mind was clearly not accustomed to travel.—Estate of Pearsons, 250.

Wills.—Technical Words—When Given Their Popular Meaning.—It is the duty of the court to look for general intent of the testator, to put itself in his place, to regard coexistent circumstances, and, if a technical construction of words and phrases is at variance with the obvious general intention, to apply a rule of interpretation which will give to language its ordinary effect.—Estate of Pearsons, 250.

10. Precatory Words.

Will.—Precatory Words are Given only their natural force.—Estate of Whitcomb, 279.

Wills.—Precatory Words.—Where a testator (who is a lawyer) devises property to a nephew and to the nephew's son, and recommends to the nephew to leave his portion thereof, after his own death and the death of his wife, in trust for such son and to his children or descendants, if any are living at the time of the death of the son, and if there are none so living then to Harvard College, the word "recommend" is not equivalent to a direction or command, but is

only a suggestion, which the beneficiary is free to follow or ignore.—Estate of Whitecomb, 279.

11. Several Testamentary Instruments.

Wills—Several Instruments.—Two testamentary instruments are to be taken and construed together as one instrument.—Estate of Jones, 178.

Residuary Clauses.—Where Two Testamentary Instruments are Admitted to Probate as the last will of the testator, each instrument in itself being complete as a will and each containing a residuary clause, the two clauses are inconsistent and the latter clause prevails, unless it fails in whole or in part, in which event the residuary clause of the prior will operates.—Estate of Jones, 178.

Wills—Several Instruments.—The Rule of Construction is substantially the same where there are several wills to be harmonized, as where there are several clauses in the same will and codicils.—Estate of Jones, 178.

Wills.—A Prior Will Remains Effectual so Far as Consistent with the provisions of the subsequent will.—Estate of Jones, 178.

12. Transposition of Parts of Instrument.

Wills—Transposition of Words.—Words or Clauses of Sentences, or even whole paragraphs of a will, may be transposed to any extent with a view to show the intention of the testator.—Estate of Behrmann, 513.

Wills—Transposition of Paragraphs.—Words or clauses of sentences, or even whole paragraphs, of a will may be transposed to any extent, with a view to show the intention of the testator.—Estate of Berton, 319.

Wills—Transposition of Order of Bequests.—Where it appears from the entire language of a will that the testator's intention will be rendered clearer by transposing the order of the bequests, the court will construe the bequests as though the testator had written them in the transposed order.—Estate of Jones, 178.

Wills.—All the Parts of a Will are to be Construed in relation to each other, so as, if possible, to form one consistent whole; but where several parts are wholly irreconcilable, the latter must prevail.—Estate of Jones, 178.

Remainders—When not Based on Double Contingency.—Under a will which reads: "I give to my daughter all the property of which I die seised, remainder to the heirs of her body in fee simple, but in the event of her death without surviving heirs of her body, I direct said remainder to be distributed to my heirs then surviving according to the law of descent at the date of my daughter's death," the remainders cannot be attacked as invalid on the ground that the contingencies on which they depend are double or constitute a pos-

sibility upon a possibility; they are alternate, and respectively depend on only one contingency.—Estate of Fitzgerald, 172.

13. Estate Devised.

Wills—Cutting Down Fee.—Words of Command Addressed by a Testator to devisees are as ineffectual to reduce a fee to an estate for life as precatory or explanatory words; such words are not enough to establish an intention that is not gathered from the operative words upon the face of the will.—Estate of Hale, 191.

14. Taking Per Capita or by Representation.

Wills—Taking Per Capita or by Representation.—Where a testator bequeathes one-half of the residue of his estate to the "heirs" of a deceased sister, who left a surviving son and six children of a deceased daughter, these heirs take by right of representation and not per capita; that is, one-fourth of the residue goes to the son and one-twenty-fourth to each of the six children.—Estate of Crane, 535.

15. Presumption Against Intestacy.

Intestacy.—The Very Fact of Making a Will Raises a Very Strong Presumption against any expectation on the part of the testator of leaving any portion of his estate beyond the operation of his will.—Estate of Jones, 178.

Intestacy—Intestacy is not Favored in Law.—The law prefers a construction of a will which will prevent a partial intestacy to one which will permit such result.—Estate of Jones, 178.

16. Substitutional Legacies.

Substitutional Legacies.—Where a Decedent Leaves Two Testamentary Instruments which are admitted to probate as his last will, in each of which he bequeaths to several persons, respectively, the same amounts, and denominating each instrument as his last will, such language constitutes intrinsic evidence of the testator's intention, and the legacies in the latter instrument are substitutional for those contained in the former.—Estate of Jones, 178.

17. Lapse of Legacy on Death of Legatee.

Wills—Lapse of Legacy on the Death of Legatee.—Where a testator bequeaths one-half of the residue of his estate to a sister, and she dies before his death leaving a daughter and three sons, and these sons also died before the testator, one of them leaving a widow and two sons and the other a widow, the bequest does not lapse, but goes to the lineal descendants of the sister. However, the widows of the deceased sons, not being lineal descendants, are not entitled to share in the bequest.—Estate of Crane, 535.

See Annuities; Charities; Community Property; Contest of Wills; Insanity and Insane Delusions; Probate of Wills.

Note.

- testamentary capacity of sick or aged person, 96.
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- internal evidence of will as indicating testamentary capacity, 31.
- transposition of words and supplying omitted ones, 521.
- presumption of revocation when will cannot be found after death, 428.
- proof and establishment of lost or destroyed wills, 427-457.
- giving effect to every part of will in construing it, 324.
- transposition of words or provisions in will, 324.
- precatory words and trusts, 282-412.

WITNESSES.

See Claims Against Decedent; Probate of Will.

Note.

- right of party to testify, where adverse party is an executor, to facts occurring before the death of decedent, 52.

WITNESS FEES.

See Costs and Counsel Fees.

WORDS AND PHRASES.

Words and Phrases.—In **Defining Words and Phrases**, Code of Civil Procedure, section 16, means words are construed according to the text (here of the statute) and the approved usage of the language.—Estate of McGinn, 313.

- "Actions," 97.
- "Costs," 313.
- "Domicile," 463.
- "Heirs," 172.
- "Incompetent," 369.
- "Inhabitant," 463.
- "Insane," 369.
- "Leave," 191.
- "Limitation," 191.
- "Lucid Interval," 213.
- "Resident," 463.
- "Residence," 53.

Note.

- "Precatory Trusts," 282.
- "Relative" or "Relation," 552.

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